NORTH CAROLINA REPORTS

VOLUME 381

SUPREME COURT OF NORTH CAROLINA

6 MAY 2022

15 JULY 2022

RALEIGH
2023

CITE THIS VOLUME

381 N.C.

This volume is printed on permanent, acid-free paper in compliance with the North Carolina General Statutes.

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OF
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[1]Retired 31 October 2022. [2]Sworn in 1 October 2022. [3]Retired 30 September 2022. [4]Became Senior Resident Judge 1 October 2022.
[5]Retired 30 September 2022. [6]Appointed 21 November 2022. [7]Resigned 1 August 2022. [8]Died 4 October 2022. [9]Died 18 October 2022.

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J. Larry Senter	Raleigh
Margaret L. Sharpe	Greensboro
Leonard W. Thagard	Clinton
Charles M. Vincent	Greenville
Richard K. Walker	Hayesville

[1]Retired 30 November 2022. [2]Resigned 9 September 2022. [3]Retired 28 August 2022. [4]Sworn in 19 September 2022.

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1. Effective 1 January 2021, the Supreme Court of North Carolina adopted a universal parallel citation form. *Administrative Order Concerning the Formatting of Opinions and the Adoption of a Universal Citation Form*, 373 N.C. 605 (2019).

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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

CHARLES BLUE
v.
THAKURDEO MICHAEL BHIRO, P.A., DIXIE LEE BHIRO, P.A., AND LAUREL HILL MEDICAL CLINIC, P.C.

No. 26A21

Filed 6 May 2022

Civil Procedure—motion to dismiss—matters outside the pleadings—arguments of counsel not evidence—no conversion to motion for summary judgment

On a motion to dismiss a medical negligence claim pursuant to Civil Procedure Rule 12(b)(6), where the trial court did not consider matters outside the pleadings, it was not required to convert the motion to one for summary judgment under Civil Procedure Rule 56, which would have necessitated giving the parties additional time to conduct discovery and present evidence. Although plaintiff's counsel made several factual assertions in his memorandum of law and during the hearing, arguments of counsel are not evidence, and no evidentiary materials were submitted. The matter was remanded to the Court of Appeals for consideration of two remaining issues.

Justice EARLS concurring in part and dissenting in part.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 275 N.C. App. 1, 853 S.E.2d 258 (2020), reversing and remanding an order granting defendants' motion to dismiss plaintiff's complaint entered on 10 December 2019 by Judge Gale

M. Adams in Superior Court, Scotland County. Heard in the Supreme Court on 23 March 2022.

Ward and Smith, P.A., by Christopher S. Edwards and Alex C. Dale, for plaintiff-appellee.

Batten Lee, PLLC, by Gary Adam Moyers and Gloria T. Becker, for defendant-appellants.

NEWBY, Chief Justice.

¶ 1 In this case we determine whether the trial court was required to convert a motion to dismiss under N.C. R. Civ. P. 12(b)(6) to a motion for summary judgment under Rule 56. A motion to dismiss under Rule 12(b)(6) asserts that the complaint, even when the allegations are taken as true, fails to state a claim upon which relief can be granted. If, however, a trial court considers matters outside the pleading, then it must convert the motion to a motion for summary judgment. Here the trial court did not consider matters outside the pleading and thus was not required to convert the motion. Therefore, we reverse the decision of the Court of Appeals and remand to the Court of Appeals for consideration of plaintiff's remaining arguments.

¶ 2 Because this case arises from a motion to dismiss under Rule 12(b)(6), we take the following allegations from the complaint as true. Defendants Thakurdeo Michael Bhiro and Dixie Lee Bhiro were physician assistants licensed to practice in North Carolina and were employed by defendant Laurel Hill Medical Clinic, P.C. (the Clinic). The Clinic "is a family practice located in Laurel Hill, North Carolina . . . comprised of family medicine practitioners who provide comprehensive care to patients of all ages."

¶ 3 The Bhiros were plaintiff's primary care providers. The Bhiros treated plaintiff "for a variety [of] ailments" and provided "routine physical examinations, medic[ation] management, and preventative medicine." On 24 January 2012, Mr. Bhiro ordered a prostate specific antigen (PSA) test to screen plaintiff for prostate cancer. Generally, a PSA test result of 4 nanograms per milliliter of blood "is considered abnormally high for most men and may indicate the need for further evaluation with a prostate biopsy." The results from this test, which were provided to the Bhiros, indicated that plaintiff's PSA level was 87.9 nanograms per milliliter, significantly higher than the normal range. Though the Bhiros continued to treat plaintiff for other issues, they never "provided any follow

up care or referrals as a result of the elevated PSA test result." The results from another PSA test performed six years later on 22 March 2018 indicated that plaintiff's PSA level was 1,763 nanograms per milliliter. Plaintiff was diagnosed with metastatic prostate cancer soon thereafter. The Bhiros "continued as [p]laintiff's primary medical care providers until January, 2019." Plaintiff filed his complaint on 17 June 2019, contending that the Bhiros were negligent by failing to provide follow-up care after learning the results of the 24 January 2012 PSA test and failing to diagnose plaintiff with prostate cancer. Moreover, plaintiff alleged that the Clinic was vicariously liable for the Bhiros' negligence.

¶ 4 All defendants jointly filed a motion to dismiss plaintiff's complaint under Rule 12(b)(6), arguing that plaintiff's action was barred by the three-year statute of limitations and the four-year statute of repose in N.C.G.S. § 1-15(c). In response, plaintiff contended that his complaint was timely filed in 2019 despite his delay because the Bhiros continuously treated him since the allegedly negligent act occurred in 2012. Both defendants and plaintiff submitted memoranda of law in support of their positions. At the hearing on defendants' motion on 12 November 2019, defendants' counsel argued that "when a motion to dismiss is brought, we must look at the four corners of the complaint." Plaintiff's counsel agreed, focusing on the allegations in the complaint throughout his argument. At the end of the hearing, plaintiff's counsel made an oral motion for leave to amend the complaint, stating that "if Your Honor does not believe I included enough factual information in the complaint, we'd request leave to amend the complaint." On 10 December 2019, the trial court entered an order granting defendants' Rule 12(b)(6) motion and implicitly denying plaintiff's motion for leave to amend the complaint, stating in part that:

> The [c]ourt, having heard arguments of parties and counsel for the parties and having reviewed the court file, pleading[ ], and memorand[a] of law submitted by both parties, . . . finds that Plaintiff failed to state a claim upon which relief can be granted and the Defendants' Motion to Dismiss should be allowed pursuant to N.C. R. Civ. P. 12(b)(6).

Thus, the trial court dismissed plaintiff's claims with prejudice. Plaintiff appealed.

¶ 5 At the Court of Appeals, plaintiff argued that the trial court (1) converted the Rule 12(b)(6) motion to a Rule 56 motion and thus erred by not giving the parties sufficient opportunity for discovery and to present

evidence; (2) erred by granting the Rule 12(b)(6) motion, assuming it was not converted; and (3) erred by denying his oral motion for leave to amend the complaint. *Blue v. Bhiro*, 275 N.C. App. 1, 3, 6–7, 853 S.E.2d 258, 260, 262 (2020). A divided panel of the Court of Appeals agreed with plaintiff that the trial court converted the motion to dismiss to one for summary judgment and should have provided additional time for discovery and the presentation of evidence. *Id.* at 2, 853 S.E.2d at 259–60.

¶ 6 The Court of Appeals began its analysis by "determin[ing] whether the trial court reviewed the [c]omplaint under Rule 12(b)(6) . . . or the pleadings and facts outside the pleadings under Rule 56." *Id.* at 3, 853 S.E.2d at 260–61 (emphasis omitted). To determine whether the motion was converted, the Court of Appeals looked to whether the trial court "consider[ed] . . . matters outside the pleading[ ]." *Id.*, 853 S.E.2d at 261. The Court of Appeals acknowledged that "memoranda of law and arguments of counsel are generally 'not considered matters outside the pleading[ ].' " *Id.* at 5, 853 S.E.2d at 261 (quoting *Privette v. Univ. of N.C. at Chapel Hill*, 96 N.C. App. 124, 132, 385 S.E.2d 185, 189 (1989)). The Court of Appeals, however, also noted an apparent exception, that "the consideration of memoranda of law and arguments of counsel can convert a Rule 12 motion into a Rule 56 motion if the memoranda or arguments 'contain[ ] any factual matters not contained in the pleading[ ].' " *Id.*, 853 S.E.2d at 262 (first alteration in original) (quoting *Privette*, 96 N.C. App. at 132, 385 S.E.2d at 189). The Court of Appeals reasoned that the terms of the trial court's order expressly indicated that the trial court considered the parties' memoranda and arguments of counsel, "both of which contained facts not alleged in the [c]omplaint." *Id.* at 4, 853 S.E.2d at 261 (emphasis omitted). According to the Court of Appeals, the trial court did not expressly exclude those facts which were not alleged in the complaint. *Id.* at 6, 853 S.E.2d at 262. Thus, the Court of Appeals concluded that the trial court "considered matters beyond the pleading[ ]" and converted the Rule 12(b)(6) motion to a Rule 56 motion. *Id.*

¶ 7 The Court of Appeals then noted that when a Rule 12(b)(6) motion is converted to a Rule 56 motion, Rule 12(b) provides that "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." *Id.* (quoting N.C.G.S. § 1A-1, Rule 12(b), (c) (2019)). Because the trial court did not give the parties such an opportunity, the Court of Appeals concluded that "it would be improper for [this court] to make a determination of the statute of limitations issue on the current evidence." *Id.* For the same reason, the Court of Appeals declined to discuss plaintiff's argument that the trial court erred by denying his motion for leave to amend the complaint. *Id.* at 6–7, 853 S.E.2d at 262. Thus, the Court of Appeals reversed the trial court's order

and remanded the case to the trial court to give the parties "a reasonable opportunity to gather and present evidence on a motion for summary judgment." *Id.* at 7, 853 S.E.2d at 263.

¶ 8 The dissenting opinion at the Court of Appeals, however, would have affirmed the trial court's order. *Id.* (Hampson, J., dissenting). The dissent argued that the trial court did not convert defendants' motion to dismiss. *Id.* at 7–8, 853 S.E.2d at 263. The dissent noted that although the parties' memoranda and arguments of counsel may have referenced "facts not alleged in the [c]omplaint, these were merely arguments of counsel." *Id.* at 8, 853 S.E.2d at 263. The dissent noted that "[n]o evidentiary materials—discovery, exhibits, affidavits, or the like—were offered or submitted to the trial court." *Id.* Thus, the dissent would have held that the trial court did not consider matters outside the pleading and did not convert the motion. *Id.*

¶ 9 Accordingly, the dissent also addressed plaintiff's remaining arguments. *Id.* at 8–11, 853 S.E.2d at 263–65. The dissent argued that the claim was barred by the statute of limitations or the statute of repose in N.C.G.S. § 1-15(c) and thus the trial court properly granted the motion to dismiss. *Id.* at 8–10, 853 S.E.2d at 263–65. Further, the dissent contended that the trial court did not err by denying plaintiff's oral motion for leave to amend the complaint. *Id.* at 10–11, 853 S.E.2d at 265. Therefore, the dissent would have affirmed the trial court's order. *Id.* at 11, 853 S.E.2d at 265. Defendants appealed to this Court based upon the dissenting opinion at the Court of Appeals.

¶ 10 Defendants argue the Court of Appeals erred by holding that the trial court considered matters outside the pleading and thus converted the motion to dismiss to a motion for summary judgment. We agree.

¶ 11 Whether a Rule 12(b)(6) motion has been converted to a Rule 56 motion is a question of law subject to de novo review. *See Eastway Wrecker Serv., Inc. v. City of Charlotte*, 165 N.C. App. 639, 642, 599 S.E.2d 410, 412 (2004), *aff'd per curiam*, 360 N.C. 167, 622 S.E.2d 495 (2005); *see also Green v. Freeman*, 367 N.C. 136, 141, 749 S.E.2d 262, 267 (2013). A Rule 12(b)(6) motion focuses on the legal sufficiency of the allegations in the complaint. *See Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013) ("We consider 'whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory.' " (quoting *Coley v. State*, 360 N.C. 493, 494, 631 S.E.2d 121, 123 (2006))). As such, when considering a Rule 12(b)(6) motion, the trial court is limited to reviewing the allegations made in the complaint. *See Kessing v. Nat'l Mortg.*

Corp., 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971) ("[U]nder Rule[ ] 12(b)(6) . . . the motion is decided on the pleading[ ] alone . . . ."). Rule 12(b) addresses a trial court's consideration of matters not included in the complaint, providing that

> [i]f, on a motion asserting the defense numbered (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56.

N.C.G.S. § 1A-1, Rule 12(b) (2021). Thus, "[a] Rule 12(b)(6) motion to dismiss . . . is indeed converted to a Rule 56 motion for summary judgment when matters outside the pleading[ ] are presented to and not excluded by the court." *Stanback v. Stanback*, 297 N.C. 181, 205, 254 S.E.2d 611, 627 (1979) (citing *Kessing*, 278 N.C. at 533, 180 S.E.2d at 829).

¶ 12 The phrase "matters outside the pleading" refers to evidentiary materials used to establish facts. *See Carlisle v. Keith*, 169 N.C. App. 674, 689, 614 S.E.2d 542, 552 (2005) ("While extraneous matter usually consists of affidavits or discovery documents, it may also consist of live testimony, stipulated facts, [or] documentary evidence in a court's file." (alteration in original) (emphasis omitted) (quoting G. Gray Wilson, 1 North Carolina Civil Procedure § 12-3, at 210–11 (2d ed. 1995))). Notably, "it is axiomatic that the arguments of counsel are not evidence." *State v. Collins*, 345 N.C. 170, 173, 478 S.E.2d 191, 193 (1996). Accordingly, "[m]emoranda of points and authorities as well as briefs and oral arguments . . . are not considered matters outside the pleading." *Privette*, 96 N.C. App. at 132, 385 S.E.2d at 189 (second alteration in original) (quoting 5 Wright & Miller, Federal Practice and Procedure § 1366, at 682 (1969)). Finally, it is a "well[-]established principle that there is a presumption in favor of the regularity and validity of the proceedings in the lower court." *Phelps v. McCotter*, 252 N.C. 66, 67, 112 S.E.2d 736, 737 (1960) (citing *Durham v. Laird*, 198 N.C. 695, 153 S.E. 261 (1930)).

¶ 13 Here the trial court's order stated that it considered the "arguments of parties and counsel for the parties and . . . reviewed the court file, pleading[ ], and memorand[a] of law submitted by both parties." Nothing in the trial court's order indicates any additional documents were presented apart from the memoranda submitted by the parties. Defendants' memorandum included the pleadings, a statute, and case law as exhibits, but it did not include any evidentiary materials. Plaintiff did not include any exhibits with his memorandum. Though plaintiff's counsel made

several factual assertions in his memorandum and during the hearing, these statements by plaintiff's counsel were not evidence and thus are not matters outside the pleading. Accordingly, the trial court did not consider any matters outside the pleading.

¶ 14 Because the trial court's review was limited to the pleading, it did not convert the Rule 12(b)(6) motion to a Rule 56 motion. Therefore, the Court of Appeals erred by reversing the trial court's order. Further, the Court of Appeals majority did not determine whether the trial court properly denied plaintiff's motion for leave to amend his complaint nor whether the trial court properly granted defendants' motion to dismiss. Accordingly, we remand this case to the Court of Appeals to address these issues in the first instance. *See Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 540, 809 S.E.2d 853, 854 (2018) (reversing a decision of the Court of Appeals and remanding the case for the Court of Appeals to consider the defendant's remaining arguments in the first instance).

REVERSED AND REMANDED.

Justice EARLS concurring in part and dissenting in part.

¶ 15 I agree with the majority that the Court of Appeals erred in concluding that defendants' motion to dismiss had been or needed to be converted into a Rule 56 motion for summary judgment. I write separately to express my disagreement with the majority's decision to remand this case to the Court of Appeals. There are two remaining issues in this case—whether the trial court properly granted defendants' motion to dismiss and whether the trial court should have granted Mr. Blue leave to amend his complaint. Both are pure questions of law that have been fully briefed before this Court. There are no disputed issues of fact that need to be resolved to address these issues. There are meaningful prudential reasons why we should endeavor to resolve this dispute quickly —according to his complaint, Mr. Blue was diagnosed with metastatic prostate cancer in 2018, allegedly due to defendants' negligence. Thus, I believe resolving the outstanding legal questions rather than remanding for further proceedings would be the disposition most consistent with our responsibility to foster the fair, evenhanded, efficient, open, and meaningful administration of justice.

¶ 16 It is indisputable that this Court possesses the authority to resolve this case now under these circumstances. Indeed, it is routine for this Court to address dispositive issues not resolved by the Court of Appeals when doing so requires making purely legal determinations. *See*, *e.g.*, *Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd.*

of Adjustment, 365 N.C. 152, 158 (2011) ("Remand is not automatic when 'an appellate court's obligation to review for errors of law can be accomplished by addressing the dispositive issue(s).' " (quoting *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 664 (2004))); *see also Meza v. Div. of Soc. Servs.*, 364 N.C. 61, 73 (2010) ("We now proceed to the substantive issues in the interests of judicial economy and fairness to the parties."); *N.C. Farm Bureau Mut. Ins. Co. v. Cully's Motorcross Park, Inc.*, 366 N.C. 505, 514 (2013) ("[W]hen the new analysis relies upon conclusions of law rather than findings of fact, and when the findings of fact made by the trial court are unchallenged, this Court may elect to conduct the analysis rather than to remand the case.").

¶ 17 As we explained in *Carroll*, there are multiple prudential factors that counsel in favor of fully resolving an appeal when it comes before this Court:

> In the present case, the trial court's erroneous articulation and application of the *de novo* standard of review in no way interferes with our ability to assess how that standard *should have been applied* to the particular facts of this case. Moreover, the status of [the plaintiff's] employment and salary has remained unsettled during the past six years of ongoing litigation. Thus, in the interests of judicial economy and fairness to the parties, we proceed to consider the substantive issues on appeal.

358 N.C. at 665. While it is also certainly within this Court's discretion to decide to remand the case for the Court of Appeals to resolve remaining legal issues in these circumstances, we should explain why we are choosing to remand this case rather than reach outstanding legal issues by reference to neutral principles, and we should consistently apply those principles in considering whether a remand is necessary in this case and in future cases. In addition to the prudential factors noted in *Carroll*, such neutral and consistent principles might include the length of time the case has been pending to date, the extent to which any party is prejudiced by further delay, whether deciding the issue will result in a final disposition of the case, whether the parties have had the opportunity to fully brief the remaining issues, and whether the issue requires the routine application of well-established law such that remand would likely result in a quick resolution unlikely to engender further appeal, as opposed to an issue of first impression for this Court such that immediate guidance from this Court will be useful and more expeditious than multiple appeals.

¶ 18 In this case, although the majority in the Court of Appeals did not reach the two outstanding questions presented in Mr. Blue's appeal, the dissent did. And as the dissent and the parties' briefs make clear, the legal question the Court of Appeals will need to reach on remand is not one this Court has previously addressed. In particular, answering the question of whether Mr. Blue's complaint is time-barred will involve interpreting how the continuing course of treatment exception to the three-year statute of limitations for personal injury claims applies to care provided by a primary-care physician. This Court recognized the continuing course of treatment exception for the first time in *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133 (1996). We have not revisited the doctrine since. There are numerous Court of Appeals opinions interpreting the doctrine in ways that are arguably internally contradictory. *Compare Whitaker v. Akers*, 137 N.C. App. 274, 277–78 (2000) (concluding that the doctrine applies when a physician continues a particular course of treatment over a period of time, so long as the doctor continues to fail to diagnose and to treat the condition), *with Glover v. Charlotte-Mecklenburg Hosp. Auth.*, 261 N.C. App. 345, 355–56 (2018) (concluding that the plaintiff need not show the treatment rendered subsequent to the original negligent act was also negligent), *writ denied*, *review denied*, 372 N.C. 299 (2019). Accordingly, it appears that the chances of this case coming back to this Court after the Court of Appeals answers the precise legal question presently before us, all prior to discovery and a trial, are not trivial.

¶ 19 Nor is the cost to the parties trivial, both financially and otherwise. Mr. Blue filed his complaint almost three years ago. The remaining questions before us have already been briefed and argued at least twice. If Mr. Blue prevails in the appellate process and his claim is not time-barred, his case will be remanded to the trial court for further proceedings. As a litigant with a serious life-threatening illness, justice delayed may be justice denied in this case. Here, an unnecessarily prolonged appellate process is inconsistent with the prompt and efficient administration of justice, an aim to which we all and always aspire. By contrast, these factors and considerations were not present in the case relied upon by the majority, *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540 (2018). In *Wilkie*, the issues not decided by this Court were not briefed in the first place because this Court denied discretionary review specifically as to those issues. *See* Special Order, *Wilkie v. City of Boiling Spring Lakes*, No. 44PA17 (N.C. May 3, 2017). Nor did those remaining issues implicate any novel or particularly complex legal principles: the ultimate question was whether property owners would be compensated by the government for flood damage to their home. *Wilkie*, 370 N.C. at 540. While

Wilkie confirms the indisputable notion that this Court possesses the authority to remand cases to the Court of Appeals to decide purely legal issues in the first instance, *Wilkie* does nothing to demonstrate why doing so is necessary or appropriate in this case.

¶ 20 Under the circumstances of this case, jurisprudential and administrative reasons justify proceeding to resolve the two remaining outstanding issues, which were both addressed by the dissent below, briefed by the parties, and are thus properly before us. Therefore, I respectfully concur in part and dissent in part.

DORIS G. CUNNINGHAM, EMPLOYEE
v.
THE GOODYEAR TIRE & RUBBER COMPANY, EMPLOYER, LIBERTY MUTUAL INSURANCE COMPANY, CARRIER

No. 465A20

Filed 6 May 2022

1. Workers' Compensation—jurisdiction—timeliness of filing—N.C.G.S. § 97-24—standard of review—de novo

The Industrial Commission's determination of whether an injured employee's application for worker's compensation benefits was timely filed pursuant to N.C.G.S. § 97-24 constituted a jurisdictional fact and, therefore, was subject to de novo review on appeal.

2. Workers' Compensation—timeliness of filing—last payment of medical compensation—chronic back pain—related to prior injury

A claim for worker's compensation benefits filed by a press operator at a tire factory (plaintiff) was not time-barred pursuant to N.C.G.S. § 97-24 because she filed it within two years of the last payment of medical compensation by her employer—for a back injury she suffered in 2014—which occurred in 2017, not 2015 as found by the Industrial Commission. Records and testimony from plaintiff and multiple doctors demonstrated that plaintiff's medical treatment for chronic back pain in 2017 was related to her 2014 injury and was not due solely to injuries she sustained in 2011 (claims for which were settled in 2012).

Chief Justice NEWBY dissenting.

Justice BARRINGER joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 273 N.C. App. 497 (2020), reversing and remanding an opinion and award entered 30 July 2019 by the North Carolina Industrial Commission. Heard in the Supreme Court on 4 October 2021.

Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner and David P. Stewart; and Jay Gervasi, for plaintiff.

Young Moore & Henderson, PA, by Angela Farag Craddock, for defendant-appellant.

The Sumwalt Group, by Vernon Sumwalt; and Lennon, Camak & Bertics, PLLC, by Michael Bertics, for North Carolina Advocates for Justice, amicus curiae.

HUDSON, Justice.

¶ 1 The Goodyear Tire & Rubber Company (defendant-employer) and Liberty Mutual Insurance Company (defendant-carrier) (together, defendants) appeal as of right on the basis of a dissenting opinion from a decision of the Court of Appeals, in which the majority held the North Carolina Industrial Commission erred in denying Doris G. Cunningham (plaintiff) her claim for disability compensation from defendants. On appeal, defendants argue the Court of Appeals erred in holding plaintiff's claim was not time-barred under N.C.G.S. § 97-24 thereby reversing the Full Commission's dismissal of plaintiff's claim based on an alleged 27 May 2014 injury, and by remanding the case to the Commission to determine whether plaintiff suffered a compensable injury under the Workers' Compensation Act. We affirm the decision of the Court of Appeals reversing the opinion and award of the Commission and remand for further remand to the Commission for consideration of the merits of plaintiff's 27 May 2014 claim.

I. Factual and Procedural Background[1]

¶ 2 Plaintiff, now 59 years old, began working for defendant-employer, the Goodyear Rubber and Tire Company, in 1999, was laid off and rehired

1. Although in a workers' compensation case, our summary of the facts is ordinarily taken from unchallenged findings of the Industrial Commission, here we are called upon

in 2001, and worked continuously thereafter for at least 17 years. Since 2014, when the relevant events began, plaintiff has been working as a press operator. This physically demanding job requires plaintiff to walk at least eight miles a day, pick up tires, place them in a loader pan, and clear out jams when the tires backed up. Due to her height, she frequently has to reach, climb, and lift. She is personally responsible for 15 machines that "cook" the tires, and when other workers are on break, she handles twice that amount. She picks up "anywhere from one thousand to fourteen hundred tires" during her typical 12-hour shift. Her production quota, or "expectancy" from defendant-employer, is the processing of fourteen-hundred tires per shift.

¶ 3 Plaintiff picks the tires up from a flatbed truck and places them into a loading pan, in order to scan them. When she lifts the tire off the flat bed, she pulls it towards her, stands it up, and flips it over to turn the barcode up, which she scans along with the paperwork to ensure the tire is the correct one for the mold. At that point a machine picks up the tires from the loading pan where they are molded and pressed and then returned to a conveyor belt. The tires sometimes get stuck in this process and, on a bad day, ten tires an hour might get stuck. Plaintiff had injured her back twice while lifting tires in 2011; she filed claims with the Commission and both claims were settled in 2012.

¶ 4 On 27 May 2014 during a twelve-hour shift, plaintiff attempted to pick a tire up off the truck, but the tire was stuck, causing plaintiff to hurt her back. She immediately notified her supervisor that she was hurt. The next morning when she woke up, she could not move. She filed an internal report titled a Form F159, or "Associate Report of Incident and Associate Statement of Work Related Accident." Plaintiff was placed on light duty for six weeks, and she returned to full-time work on 8 July 2014 without missing any work.

¶ 5 When defendant-employer received plaintiff's F159, it sent the information to defendant-carrier, Liberty Mutual, plaintiff-employer's insurance carrier for workers' compensation. Defendant-carrier used the information received from defendant-employer to complete a Form 19, Employer's Report of Employee's Injury, and filed it with the Commission. Defendant-carrier mailed a packet including the completed Form 19 and a blank Form 18, "Notice of Accident to Employer and

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to re-find facts in order to determine an underlying but dispositive jurisdictional issue. Accordingly, we are not bound by those findings, as explained below, and base this summary on the evidence.

Claim of Employee," to plaintiff. However, plaintiff testified that she never received these forms and that she believed her workers' compensation claim was already accepted because she had been placed on light duty, unlike for her 2011 injuries. She testified she was prepared to fill out a Form 18 in 2014 but was told by her union representative that "they" had already received her form.

¶ 6 After her 27 May 2014 injury, plaintiff received medical treatment through an onsite medical facility (the dispensary), as well as from Frank Murray, a physical therapist who contracts with defendant-employer to provide physical therapy treatment to defendant-employer's employees. Mr. Murray had treated Ms. Cunningham once on 10 October 2011 following her 18 September 2011 back injury and determined that "she had low-back pain, but it was beginning to resolve. She had no real limitations in range of motion or strength." Mr. Murray did not treat plaintiff again for back pain until after the 27 May 2014 injury on 3 June 2014.

¶ 7 On 3 June 2014, plaintiff reported to Mr. Murray that her pain was at a level of ten out of ten. By 9 June 2014, plaintiff's pain was "five out of ten at worse [sic], to two out of ten at best." Mr. Murray testified he treated plaintiff on 10, 13, 18, 23, and 24 June 2014, and by the last visit, plaintiff's "[r]ange of motion was full and painless."

¶ 8 On 23 February 2015, however, plaintiff returned to Mr. Murray, reporting that her back pain had never completely subsided since the 2014 injury, and that she felt a recent increase in pain, describing it as "eight out of ten down to four out of ten." Mr. Murray diagnosed plaintiff with lower back pain. On 3 March 2015, Mr. Murray saw plaintiff again and she reported her pain as between "three out of ten to five out of ten."

¶ 9 Plaintiff did not return to the dispensary and Mr. Murray again until 25 April 2017. She testified that the reason she did not return until 2017 was that she began experiencing foot pain in addition to back pain and was referred to a podiatrist, Dr. Mark Thomas Eaton, in March 2016. Dr. Eaton initially diagnosed her with plantar fasciitis. However, following extensive treatment for plantar fasciitis, Dr. Eaton informed plaintiff that she had been misdiagnosed and that her problems did not come from her feet, but were caused by her back problems stemming from her 27 May 2014 injury.

¶ 10 Plaintiff returned to Mr. Murray for treatment for her back pain on 25 April 2017. Mr. Murray testified that "[plaintiff] didn't indicate that there was anything new or that something happened [in 2017]. Her response was, no, nothing happened. It—this never has completely gone away." Mr. Murray testified there was "no precipitating episode" of her

back pain in 2017 and that her pain reflected "episodic increases and decreases from the first time that [he] saw her."

¶ 11 On 28 April 2017, plaintiff visited Kelly Avants, the nurse case manager, at the dispensary. Ms. Avants told plaintiff that defendant-carrier closed her file because "she reached the statute of limitations in regard to her back claims" and they would not cover further treatment. On 8 May 2017, plaintiff reported that she had been injured again on 25 April 2017 from a stuck tire and she felt pain in her lower back.

¶ 12 David Jones, a neurosurgeon who had previously seen plaintiff for her 2011 injury, evaluated plaintiff on 19 June 2017 and 18 July 2019, following an MRI. Based on the MRI, Dr. Jones concluded that plaintiff had degeneration in the last two discs of her spine, that one of the discs had a "small far lateral disc bulge," that the second "had a more focal right-sided disc protrusion," and that both could irritate nerve roots. Dr. Jones testified it was "more than likely" that a 2017 injury exacerbated plaintiff's 27 May 2014 injury, and that "once you hurt your back the first time you are more likely to injure your back again," but there was no way to determine to what extent each injury caused her current condition.

¶ 13 On 19 May 2017, plaintiff filed separate Form 18s with the Commission for the alleged incidents on 27 May 2014 and on 25 April 2017, respectively. Defendants filed a Form 61 denying the 27 May 2014 claim and moving to dismiss the claim, arguing that the action was time-barred because it was not filed within two years of the date of the alleged injury. The matters were consolidated and on 13 December 2018, the Deputy Commissioner entered an opinion and award denying the 25 April 2017 claim and dismissing the 27 May 2014 claim for lack of jurisdiction. Regarding the 27 May 2014 injury, the Deputy Commissioner found that plaintiff did not file a claim for compensation until 29 May 2017 and that plaintiff last received medical treatment related to that injury on 3 March 2015. The Deputy Commissioner concluded plaintiff failed to file her claim within two years of either the date of the incident or the last payment of medical compensation and the claim was therefore time-barred under N.C.G.S. § 97-24(a). Regarding the 25 April 2017 claim, the Deputy Commissioner concluded the evidence in the record did not support a compensable injury.

¶ 14 Plaintiff appealed to the Full Commission, specifically arguing that she last received payment for her 27 May 2014 injury on 25 April 2017 and, therefore, had filed her claim within two years of the last payment of medical compensation. On 30 July 2019, the Full Commission entered an opinion and award dismissing the 27 May 2014 claim for lack of

jurisdiction and denying the 25 April 2017 claim. Plaintiff appealed to the Court of Appeals.

¶ 15 In a divided opinion authored by Judge Brook, the Court of Appeals reversed the opinion and award entered by the Commission after holding that compliance with the requirement of N.C.G.S. § 97-24(a) is a jurisdictional fact reviewed for the greater weight of the evidence, finding "that the 25 April 2017 visit was related to Plaintiff's May 2014 injury," and on that basis holding that the Commission erred in concluding that plaintiff's claim was time-barred by N.C.G.S. § 97-24(a). *Cunningham v. Goodyear Tire & Rubber Co.*, 273 N.C. App. 497, 506–07 (2020). Judge Tyson dissented from the majority opinion, arguing that whether a claim is time-barred by N.C.G.S. § 97-24(a) is governed by the same standard of review as other conclusions in an order and award from the Industrial Commission: "(1) whether competent evidence exists to support the Commission's findings of fact, and (2) whether the Commission's findings of fact justify its conclusions of law and decision." *Id.* at 510 (quoting *Simmons v. Columbus Cty. Bd. of Educ.*, 171 N.C. App. 725, 727–28 (2005)). Judge Tyson concluded that "[t]he majority's opinion exceeds its lawful scope of appellate review, reweighs the evidence and credibility of the testimony as finders of fact, to reverse the Commission's opinion and award." *Id.* at 513.

¶ 16 Defendants timely appealed on the basis of the dissenting opinion as of right under N.C.G.S. § 7A-30.

II. Analysis

¶ 17 On appeal, defendants argue the Court of Appeals (1) exceeded its lawful scope of appellate review by reweighing the evidence and assessing credibility of the testimony as finders of fact in order to reverse the Industrial Commission's Opinion and Award determining that Plaintiff's workers' compensation claim of injury on 27 May 2014 was barred under N.C.G.S. § 97-24; and (2) erred by failing to determine that the Industrial Commission's conclusion that Plaintiff's claim is barred under N.C.G.S. § 97-24 is supported by findings of fact, which are based upon competent evidence such that the Commission's Opinion and Award should have been affirmed. First, we hold that whether a workers' compensation claim was barred because the claim was filed after the two-year limit set by N.C.G.S. § 97-24 is a jurisdictional matter that is subject to de novo review, including of the facts, on appeal. Second, we hold the Court of Appeals properly determined that the Industrial Commission erred in concluding that plaintiff's claim is barred. Accordingly, we affirm the judgment of the Court of Appeals.

A. Standard of Review

¶ 18 **[1]** Defendants first argue the Court of Appeals erred in holding that whether a plaintiff complied with the requirements of N.C.G.S. § 97-24 is a "jurisdictional fact" subject to a de novo standard of review. In a question of first impression for this Court, defendants argue the standard of review on appeal for Commission findings on compliance with the statute's timely filing requirement is a competent evidence standard of review, rather than de novo review as applied by the Court of Appeals below.[2] We disagree.

¶ 19 Under our precedents, we ordinarily review an order of the Full Commission to determine "whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Medlin v. Weaver Const., LLC*, 367 N.C. 414, 423 (2014) (quoting *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116 (2000)). Ordinarily, "on appeal, this Court 'does not have the right to weight the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.' " *Adams v. AVX Corp.*, 349 N.C. 676, 681 (1998) (quoting *Anderson v. Lincoln Const. Co.*, 265 N.C. 431, 434 (1965)). However, when reviewing findings of fact by the Commission on which the scope of its jurisdiction depends, we apply a de novo standard of review. *See Richards v. Nationwide Homes*, 263 N.C. 295, 303–04 (1965) ("When a [party] challenges the jurisdiction of the Industrial Commission, the findings of fact made by the Commission, on which its jurisdiction is dependent, are not conclusive on the superior court, but the superior court has the power . . . on appeal, to consider all the evidence in the record, and to make therefrom independent findings of jurisdictional facts."); *id.* at 304 (" 'As a general rule the court will not accept as conclusive findings of fact of the Commission concerning a jurisdictional question, but will weigh evidence relating thereto and make its own independent findings of fact.' " (quoting 100 C.J.S. Workmen's Compensation § 763(7),

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2. Although defendants in their notice of appeal framed their first issue generally as the Court of Appeals "reweighing" the evidence, in their brief they only argue that findings regarding the timely-filing requirement are not "jurisdictional facts" and, accordingly, are subject to a competent-evidence standard of review. That precise issue was not specifically set out in the dissenting opinion below, which instead expressed the view that all findings made by the Commission are to be subject to a competent-evidence standard without distinguishing findings that are jurisdictional. *See Cunningham*, 273 N.C. App. at 513. Although defendants' argument appears to exceed the scope of review under Appellate Rule 16(b), we exercise our discretion to suspend the rules and reach it. *See* N.C. R. App. P. 2 (2021).

p. 1216)). Accordingly, we have held that "the finding of a jurisdictional fact by the Industrial Commission is not conclusive upon appeal even though there be evidence in the record to support such finding. The reviewing court has the right, and the duty, to make its own independent findings of such jurisdictional facts from its consideration of all the evidence in the record." *Lucas v. L'il General Stores*, 289 N.C. 212, 218 (1976).

¶ 20 N.C.G.S. § 97-24(a) provides that a claim is

> forever barred unless (i) a claim or memorandum of agreement as provided in G.S. 97-82 is filed with the Commission or the employee is paid compensation as provided under this Article within two years after the accident or (ii) a claim or memorandum of agreement as provided in G.S. 97-82 is filed with the Commission within two years after the last payment of medical compensation when no other compensation has been paid and when the employer's liability has not otherwise been established under this Article.

N.C.G.S. § 97-24(a) (2021). Defendants argue the Court of Appeals erred in holding that compliance with N.C.G.S. § 97-24(a) is a jurisdictional fact subject to de novo review, contending instead that this Court expressly rejected the view that a finding regarding compliance with the timely filing requirement under N.C.G.S. § 97-24 is a jurisdictional fact in *Gore v. Myrtle/Mueller*, 362 N.C. 27 (2007). Plaintiff, in turn, argues the Court of Appeals correctly held that a finding on compliance with N.C.G.S. § 97-24 is a jurisdictional fact and *Gore* provides no support for defendants' position.

¶ 21 In *Biddix v. Rex Mills*, 237 N.C. 660 (1953), this Court described the role of N.C.G.S. § 97-24's timely-filing requirement in giving rise to the jurisdiction of the Commission:

> The underlying spirit and purpose of the [Workers' Compensation] Act is to encourage and promote the amicable adjustment of claims and to provide a ready means of determining liability under the Act when the parties themselves cannot agree. The Industrial Commission stands by to assure fair dealing in any voluntary settlement and to act as a court to adjudicate those claims which may not be adjusted by the parties themselves.
>
> But the Commission has no authority—statutory or otherwise—to intervene and make an award

> of any type until its jurisdiction as a judicial tribunal has been invoked in the manner prescribed in the Act under which it operates.
>
> The claim is the right of the employee, at his election, to demand compensation for such injuries as result from an accident. If he wishes to claim compensation, he must notify his employer within thirty days after the accident, G.S. §§ 97-22, 97-23, and if they cannot agree on compensation, he, or someone on his behalf, must file a claim with the Commission within twelve months after the accident, in default of which his claim is barred. G.S. § 97-24. *Thus the jurisdiction of the Commission, as a judicial agency of the State, is invoked.*

Biddix, 237 N.C. at 662–63 (emphasis added). Moreover, despite holding the employer in that case should not be estopped from raising the timely-filing requirement, this Court noted that it did not "hold an employer may not by his conduct waive the filing of a claim within the time required by law. The law of estoppel applies in compensation proceedings as in all other cases." *Id.* at 665. Accordingly, in *Biddix* long before *Gore*, this Court recognized both that estoppel may in some circumstances bar assertion of the timely-filing requirement and that the timely-filing requirement under N.C.G.S. § 97-24 is jurisdictional in nature.

¶ 22 Contrary to defendants' argument, we did not deviate from that view in *Gore*. In *Gore*, we held that a party may be equitably estopped from asserting the two-year filing requirement under N.C.G.S. § 97-24 as an affirmative defense. *Gore*, 362 N.C. at 40. The plaintiff in *Gore* had alleged that she experienced two work-related injuries but did not file a Form 18 for either incident with the Commission within the two-year filing limit under N.C.G.S. § 97-24. The Commission found that the plaintiff had filled out the Form 18 with the employer's human resources manager, but that the manager lost the forms unintentionally, and furthermore that "[t]he plaintiff was under the reasonable belief and reasonably relied on her perception that the forms would be properly filed with the Industrial Commission." *Id.* at 30. The Court of Appeals reversed, holding the timely-filing requirement was not satisfied and, therefore, the plaintiff's claims were barred.

¶ 23 This Court disagreed, reversing the Court of Appeals and holding the doctrine of equitable estoppel may bar a defendant from raising the timely-filing requirement as an affirmative defense. *Id.* at 40. This Court

in *Gore* advanced several rationales for its holding. First, we reasoned that "[t]his principle is consistent with the general guideline that the Workers' Compensation Act requires liberal construction to accomplish the legislative purpose of providing compensation for injured employees, and that this overarching purpose is not to be defeated by the overly rigorous 'technical, narrow and strict interpretation' of its provisions." *Id.* at 36 (quoting *Guest v. Brenner Iron & Metal Co.*, 241 N.C. 448, 452 (1955)). Second, we noted that the Court of Appeals addressed the question 22 years before *Gore* in *Belfield v. Weyerhauser Co.*, 77 N.C. App. 332 (1985), and held that equitable estoppel could prevent a party from invoking the timely-filing requirement and reasoned that "[w]e have been particularly reluctant to interfere with past precedents when . . . litigants have arranged their affairs and 'rights have become vested which will be seriously impaired if the rule thus established is reversed.' " *Gore*, 362 N.C. at 37 (quoting *Hill v. Atlantic & N.C. R.R. Co.*, 143 N.C. 539, 573 (1906)). Finally, we observed that the rule was consistent with the approach of a majority of courts in other states, citing *Larson's Workers Compensation Law* for the statement that "modern application of estoppel and waiver in the present context serves 'as an antidote to the earlier approach, which was the highly conceptual one of saying that timely claim (and sometimes even notice) was "jurisdictional[.]" ' " *Id.* at 38 (quoting *Larson's*, 7 § 126.13[1]).

¶ 24 Defendants seize on this last rationale and our reliance on *Larson's* to argue that in *Gore* we necessarily held that a finding as to whether the plaintiff satisfied the timely-filing requirement is not a "jurisdictional fact" which is subject to de novo review. A close examination of our reasoning in that decision reveals that defendants' reliance is misplaced. In our discussion of the approaches of other states on the question presented in *Gore*, we cited *Larson's*, which characterized the minority approach to the issue of whether equitable estoppel could bar a defendant's invocation of the timely-filing requirement as "jurisdictional" and described that approach as one that exalted the timely-filing requirement as "a defense outside the reach of waiver, estoppel, or anything else." *Id.* But simply because we cited *Larson's* for the analysis of caselaw from other states and its characterization of the minority view, it does not follow that, based on the treatise's description of that view as "jurisdictional," we abandoned well-established caselaw that the timely-filing requirement is a condition precedent for the exercise of jurisdiction by the Commission. To the contrary, in *Gore* itself, we reaffirmed that "if the employee follows this procedure [of timely filing under the statute], "the jurisdiction of the Commission, as a judicial agency of the State, is invoked." *Id.* at 34. Accordingly, our discussion of the analysis in *Larson's*

is limited to acknowledgment of the minority view among other states that assertion of the timely-filing requirement as a bar to a workers' compensation claim is not limited by the doctrine of equitable estoppel.

¶ 25 These seemingly contradictory statements in *Gore*—recognition of the jurisdictional nature of the timely-filing requirement as a condition precedent and rejection of a "jurisdictional" approach to equitable estoppel—can be reconciled. Under North Carolina law, satisfaction of the timely-filing requirement is a condition precedent to the exercise of the Commission's jurisdiction and, accordingly, implicates the subject-matter jurisdiction of the Commission.[3] However, under *Gore*, unlike questions of subject-matter jurisdiction in other contexts, a defendant may be barred by equitable estoppel from raising lack of jurisdiction for failure to comply with the timely-filing requirement of N.C.G.S. § 97-24 as an affirmative defense. The reason for this exception to the general rule that a defense of lack of jurisdiction is not barred by estoppel is the primary rationale of *Gore*: the legislative purpose underpinning the Workers' Compensation Act, which is the statutory source of the Commission's jurisdiction. As we explained in *Gore*, "[t]his principle is consistent with the general guideline that the Workers' Compensation Act requires liberal construction to accomplish the legislative purpose of providing compensation for injured employees, and that this overarching purpose is not to be defeated by the overly rigorous 'technical, narrow and strict interpretation' of its provisions." *Id.* at 36. As an overly strict reading of the timely-filing requirement would frustrate this purpose, we reasoned that the jurisdiction conferred by the Workers' Compensation Act on the Commission was more generous than that which a fastidious adherence to the timely-filing requirement would entail and, accordingly, equitable estoppel could bar assertion of lack of jurisdiction as a defense. Indeed, procedural requirements

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3. Defendants also rely on our statement in *Gore* that "We have long held that a condition precedent, unlike subject matter jurisdiction, may be waived by the beneficiary party by virtue of its conduct." *Gore*, 362 N.C. at 38 (citing *Johnson & Stroud v. R.I. Ins. Co.*, 172 N.C. 142, 147-48 (1916)). We concede this sentence is an inaccurate statement in the context of the Workers' Compensation Act because here, at least, the timely-filing requirement is a condition precedent *to the invocation of the Commission's jurisdiction.* Accordingly, it implicates the subject-matter jurisdiction of the Commission. The provision in *Johnson & Stroud* was a term of a contract that was a condition precedent to liability under the contract and, accordingly, went to the merits of that case, not to the judicial power of a court or other body. By this anomalous sentence in *Gore* we did not abandon the view to which we have hewn since *Biddix* that assertion of the timely-filing requirement may be barred by estoppel *despite* implicating the subject-matter jurisdiction of the Commission, which after all is a creature of statute, since this interpretation best accomplishes the purpose of that statute.

are somewhat relaxed elsewhere in the Workers' Compensation Act. *See Belfield v. Weyerhauser Co.*, 77 N.C. App. 332, 336–37 (1985) (collecting examples). Although we acknowledged the legislative purpose of compensating workers for their injuries demanded a liberal construction in holding equitable estoppel may bar a defendant from assertion of the timely-filing requirement, this decision merely construed the reach of the Commission's jurisdiction consistent with the Act's legislative purpose; it did not convert a jurisdictional provision into a non-jurisdictional one. We conclude that *Gore* fails to support defendants' argument that a finding regarding the timely-filing requirement is not jurisdictional.

¶ 26 Finally, while this Court is not bound by decisions of the Court of Appeals, that court has consistently applied a de novo standard of review to the Commission's findings under N.C.G.S. § 97-24, treating them as jurisdictional. *See*, *e.g.*, *Hall v. U.S. Xpress*, *Inc.*, 256 N.C. App. 635, 640 (2017); *Craver v. Dixie Furniture Co.*, 115 N.C. App. 570, 577 (1994); *Weston v. Sears Roebuck & Co.*, 65 N.C. App. 309, 314 (1984), *disc. rev. denied*, 311 N.C. 407 (1984).

¶ 27 In summary, we hold that a finding by the Commission as to whether an employee seeking workers' compensation complied with N.C.G.S. § 97-24's timely-filing requirement is a jurisdictional fact and, as such, is subject to de novo review.

B. Application of the Timely-Filing Requirement

¶ 28 **[2]** Having determined the Court of Appeals used the appropriate, de novo standard of review for review of jurisdictional facts, we now consider whether it erred in applying that standard in its review of the Commission's findings. In its (jurisdictional) findings of fact below, the Commission determined that the 2014 claim was barred because defendant-employer "did not pay for medical treatment beyond April 2015," and plaintiff did not file a claim within two years. The Court of Appeals held the Commission erred in so finding because evidence in the record showed that "plaintiff's return visit to Mr. Murray on 25 April 2017—which he related back to his 2014–15 treatment of [p]laintiff and was paid for by [d]efendant-[e]mployer—was related to her alleged 27 May 2014 injury." *Cunningham*, 273 N.C. App. at 507.

¶ 29 We agree. Applying a de novo standard of review and freely substituting our own judgment, the evidence in the record tends to show that plaintiff's 25 April 2017 visit to Mr. Murray for treatment was related to her 27 May 2014 injury. Specifically, Mr. Murray testified that plaintiff returned for treatment in April 2017 because "[s]he continued to have some back pain." Furthermore, plaintiff had received treatment from

another doctor for plantar fasciitis and, as Mr. Murray testified, "at some point . . . towards the end of that treatment, the doctor . . . felt that maybe the pain she was having in her feet was coming from her back." Finally, in his notes from the 25 April 2017 visit, Mr. Murray stated "plaintiff is familiar with me for treatment of a previous episode of back pain about two years ago. She reports that her symptoms never completely went away." In addition to Mr. Murray's testimony, Dr. Dave also testified that when he saw plaintiff in July 2017 for treatment for chronic back pain, "her current presentation was chronic pain involving the lower back for about three and a half years," which coincides with the 27 May 2014 injury. Furthermore, when plaintiff went to Dr. Jones in July 2017, she reported her chronic back pain had an onset date of 19 June 2014, coinciding with the 27 May 2014 injury.

¶ 30 The Commission, on the other hand, points to no evidence in the record in its findings to support its conclusion that plaintiff's last medical treatment for the 27 May 2014 injury was in 2015. The Court of Appeals surmised that the Commission's finding may have been based on the "discontinuation note" Mr. Murray placed in plaintiff's file after she did not return after the March 2015 visit, which he testified occurs when "people don't come back [for treatment]." Although this discontinuation note taken in isolation may be some evidence that plaintiff's medical treatment for the 27 May 2014 injury was completed in 2015, the Commission erred in relying on it for several reasons. First, the discontinuation note is contradicted by Mr. Murray's own subsequent testimony, which all showed that plaintiff continued to suffer chronic back pain stemming from the 27 May 2014 injury and that she sought and obtained subsequent treatment from several doctors and from Mr. Murray himself for that pain. Second, overwhelmingly, the greater weight of the evidence, including Dr. Dave's testimony and plaintiff's testimony, supports the contrary conclusion that plaintiff's back pain was chronic and stemmed from the 27 May 2014 injury. Finally, as the Court of Appeals reasoned, elevating the discontinuation note above other contradictory testimony in the record, and the greater weight of the evidence, "is the sort of 'technical, narrow[,] and strict interpretation' of workers' compensation provisions our case law warns against." *Id*. at 507–08 (quoting *Gore*, 362 N.C. at 36).

¶ 31 Defendants rely principally on the testimony of Dr. Jones, who opined "that plaintiff's current pain, more likely than not, was related to her 2011 injury." However, Dr. Jones' testimony does not support defendants' argument that "consequences from the May 2014 incident had resolved, and that after March 2015, [p]laintiff's spine returned to its baseline level of abnormality and chronic pain she had suffered ever

since settling her 2011 injuries," which were settled. The proposition that chronic back pain following any new back injury is attributable solely to an old one is unsupported by evidence in the record and, moreover, would frustrate the beneficent purposes of the Workers' Compensation Act of ensuring compensation for every injury attributable to the employee's work.

¶ 32 Applying the de novo standard of review to the Commission's findings regarding the timely-filing requirement, we hold the greater weight of the evidence supports that plaintiffs' 2017 medical treatment was for the 27 May 2014 injury. Accordingly, since she filed her Form 18 on 19 May 2017, her claim was not barred by N.C.G.S. § 97-24.

III. Conclusion

¶ 33 We conclude (1) findings by the Commission regarding the timely-filing requirement under N.C.G.S. § 97-24 are subject to de novo review; and (2) the Court of Appeals properly held the Commission erred in finding that plaintiffs' last medical treatment for her 27 May 2014 injury was in 2015, not 2017. Accordingly, we affirm the decision of the Court of Appeals, and remand for further remand to the Commission for consideration of the merits of plaintiff's 27 May 2014 injury claim.

AFFIRMED.

Justice BERGER did not participate in the consideration or decision of this case.

Chief Justice NEWBY dissenting.

¶ 34 This case requires us to determine whether the Full Commission properly dismissed plaintiff's claim because she did not timely file her claim with the Industrial Commission. As relevant to this case, an injured plaintiff must file a claim with the Industrial Commission within two years of a defendant's last payment of medical compensation for a prior injury. Here the Full Commission found that defendant last paid plaintiff medical compensation for her prior injury in April of 2015. Moreover, the Full Commission found that plaintiff did not file her claim within two years of that payment. Thus, the Full Commission concluded that plaintiff's claim was barred and dismissed the claim. The Full Commission's findings of fact are supported by competent evidence, and those findings in turn support the Full Commission's conclusions of law. Therefore, the opinion of the Court of Appeals should be reversed, and the Full Commission's order should be affirmed. I respectfully dissent.

¶ 35 "Under our Workers' Compensation Act, 'the [Industrial] Commission is the fact finding body.' " *Gore v. Myrtle/Mueller*, 362 N.C. 27, 40, 653 S.E.2d 400, 409 (2007) (quoting *Brewer v. Powers Trucking Co.*, 256 N.C. 175, 182, 123 S.E.2d 608, 613 (1962)). This Court reviews "an order of the Full Commission only to determine 'whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law.' " *Medlin v. Weaver Cooke Constr., LLC*, 367 N.C. 414, 423, 760 S.E.2d 732, 738 (2014) (quoting *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000)). "Because the Industrial Commission is the sole judge of the credibility of the witnesses and the weight of the evidence[,] [w]e have repeatedly held that the Commission's findings of fact are conclusive on appeal when supported by competent evidence, even though there [may] be evidence that would support findings to the contrary." *Id.* (first and second alterations in original) (internal quotations omitted).

¶ 36 Plaintiff's claim is governed by N.C.G.S. § 97-24, which states that

> [t]he right to compensation under this Article shall be forever barred unless . . . (ii) a claim . . . is filed with the Commission within two years after the last payment of medical compensation when no other compensation has been paid and when the employer's liability has not otherwise been established under this Article.

N.C.G.S. § 97-24(a) (2021). This requirement "has repeatedly been held to be a condition precedent to the right to compensation." *Gore*, 362 N.C. at 38, 653 S.E.2d at 408 (citing *Montgomery v. Horneytown Fire Dep't*, 265 N.C. 553, 555, 144 S.E.2d 586, 587 (1965) (per curiam)). This "condition precedent establishes a time period in which suit must be brought in order for the [claim] to be recognized." *Boudreau v. Baughman*, 322 N.C. 331, 340–41, 368 S.E.2d 849, 857 (1988).

¶ 37 Here it was undisputed that defendant paid no other compensation and that defendant's liability had not otherwise been established. Accordingly, for plaintiff's claim to be timely under N.C.G.S. § 97-24(a)(ii), plaintiff must have filed her claim within two years of defendant's last payment of medical compensation. Plaintiff argues that her 25 April 2017 visit with Frank Murray, the on-site physical therapist, was related to her 27 May 2014 injury. Defendant paid for this treatment in May of 2017; therefore, plaintiff contends that her claim, filed on 19 May 2017, was filed within two years of defendant's last payment of medical

compensation. Thus, the Full Commission was tasked with determining whether plaintiff's treatment with Frank Murray on 25 April 2017 was related to her 27 May 2014 injury such that her claim was timely. This analysis requires the Full Commission to make numerous credibility and weight determinations—a task it is designed to do. In resolving this issue, the Full Commission found as follows:

> 5. Following the 27 May 2014 incident, plaintiff received medical treatment from defendant-employer's dispensary, an on-site medical facility that treats employees' injuries and ailments that are work-related and non-work-related. Plaintiff received no indemnity benefits. Plaintiff last received medical treatment for the 27 May 2014 incident on 3 March 2015. Per protocol, defendant[ ] paid for this treatment in April 2015 at the latest. Defendant[ ] did not pay for medical treatment for the 27 May 2014 incident beyond April 2015.
>
> . . . .
>
> 16. . . . . In this matter, the last payment for medical treatment consequent of the 27 May 2014 incident was made in April 2015. Plaintiff did not file an Industrial Commission Form 18 until May 2017.
>
> 17. Plaintiff's testimony regarding the circumstances surrounding the 25 April 2017 alleged injury and related facts conflicts with a preponderance of the testimony and documentary evidence.

¶ 38 The Full Commission's resolution of this factual dispute is supported by competent evidence. Frank Murray testified that he first treated plaintiff on 10 October 2011 after she "reported that she lifted a tire and felt a sharp pain in [her] low back at that time." Plaintiff and defendant settled the claims arising from this injury. Frank Murray then saw plaintiff again on 3 June 2014, when she reported "that she had an onset of low-back pain one week previous [on 27 May 2014] . . . as she was reaching and pulling a tire from the bottom of the flatbed." Frank Murray testified that he provided treatment for this injury until 3 March 2015. Defendant paid for this final treatment in April of 2015. Frank Murray later marked the note from the 3 March 2015 visit as a "discontinuation note" because plaintiff had not returned for additional treatment. Frank Murray further testified that plaintiff returned for an additional visit on 25 April 2017 after plaintiff's podiatrist thought that "the pain that she

was having in her feet was coming from her back, so he recommended that she go and see about her back." Frank Murray described plaintiff's pain in 2017 as "a[n] ongoing, continuation of low-back pain. I mean, it kind of sounds as if, like, she's had . . . a baseline level of low-back pain with episodic increases and decreases since the first time that I saw her."

¶ 39 Kelly Avant, a case manager at the on-site medical clinic, testified that plaintiff visited her twice on 28 April 2017. Kelly Avant's note recorded plaintiff's statements during her first visit that day as follows:

> I went and saw Frank (Murray MSPT) for my back on Tuesday and he said I might need an[ ] x[-]ray or something, so he told me to come see you. You remember Leslie (Byrne NP) when I hurt my back the first time, she never ordered an x[-]ray or anything, the second time I hurt my back I saw [another doctor] and did therapy with Frank [Murray]. My pain level has always been a level [three], I can only remember being pain free for [two] days. I got to the point where I couldn't walk, so I went to see the podiatrist (Dr. Eaton/Cape Fear Podiatry) and he gave me injections . . . . I went back to see Dr. Eaton a couple weeks ago and he said that plantar fasciitis is not my problem and he thinks it is my back . . . . When I got hurt before I was on the 1300 row and that is the worst row . . . .

When plaintiff returned later that day, Kelly Avant informed plaintiff she would have to pay for diagnostic treatment with her own insurance. Plaintiff returned to the medical clinic a third time that evening, "stating 'I need to file an injury from 4/25/17. I didn't know that if I had another injury that I could file a claim. There was a tire stuck in the press and caused my lower back to hurt.' "

¶ 40 Several of the doctors who treated plaintiff also testified. Dr. David S. Jones, a neurologist who treated plaintiff in 2011 and 2017, attributed plaintiff's low-back pain to her 2011 injury. Dr. Nailesh Dave, a neurologist who treated plaintiff for pain management beginning on 19 July 2017, acknowledged that plaintiff's symptoms could have been related to her previous injury in 2011 or a general deterioration of her spine. Dr. Gurvinder Deol, an orthopedic surgeon who treated plaintiff on 29 March 2018, testified that plaintiff's pain "relates back to this initially picking up the tire in 2011."

¶ 41 Thus, competent evidence demonstrates that plaintiff began having low-back pain starting at least with her injury on the 1300 row in

2011. Plaintiff then settled workers' compensation claims arising from that injury. After settling those claims, plaintiff continued to experience low-back pain. Allegedly, plaintiff subsequently suffered another injury on 27 May 2014. Defendant paid for treatment related to this alleged injury through its on-site medical clinic until April of 2015. When plaintiff did not return for further treatment, her file was marked as discontinued. Plaintiff did not file a workers' compensation claim and defendant did not pay for further treatment until 2017. After plaintiff's podiatrist suggested the pain in plaintiff's feet could be related to her low-back pain, plaintiff returned to Frank Murray on 25 April 2017. Defendant paid for this treatment with Frank Murray in May of 2017. As the Full Commission found, though, this treatment was not related to the alleged incident on 27 May 2014, but rather resulted from a continuation of plaintiff's ongoing low-back pain that started as early as 2011. Plaintiff's own statements from 28 April 2017 demonstrate that since her injury in 2011, "[m]y pain level has always been a level [three], I can only remember being pain free for two days."

¶ 42 The Full Commission's supported findings demonstrate that defendant's "last payment for medical treatment consequent of the 27 May 2014 incident was made in April 2015." Moreover, the Full Commission found that plaintiff "did not file an Industrial Commission Form 18 until May 2017," more than two years later. Accordingly, the Full Commission concluded that plaintiff failed to satisfy the condition precedent in N.C.G.S. § 97-24 and her claim was barred. Because this conclusion is supported by the findings of fact, the Full Commission's order should be affirmed.

¶ 43 To broaden appellate review, the majority holds that whether a plaintiff timely files a claim under N.C.G.S. § 97-24 is a "jurisdictional fact" subject to de novo review. Contrary to the majority's characterization, in *Gore* this Court flatly rejected the jurisdictional approach to N.C.G.S. § 97-24. 362 N.C. at 38, 653 S.E.2d at 407–08. In *Gore*, the plaintiff sought to estop the defendant from asserting that N.C.G.S. § 97-24 barred the claim. *Id.* at 32, 653 S.E.2d at 404. In response, the defendant argued that the plaintiff's failure to timely file under N.C.G.S. § 97-24 had deprived the Industrial Commission of jurisdiction over the plaintiff's claim. *Id.* at 38, 653 S.E.2d at 407–08. The defendant then contended that once the Industrial Commission was deprived of jurisdiction by a plaintiff's failure to timely file, a defendant cannot restore jurisdiction to the Industrial Commission through its actions. *Id.* Thus, because the defendant saw N.C.G.S. § 97-24 as jurisdictional, the defendant contended estoppel could not apply. *Id.* at 38, 653 S.E.2d at 408. In rejecting this approach, we stated in full as follows:

> In contrast, defendants urge this Court to resurrect an antiquated approach extinguished by modern estoppel principles in all but a few jurisdictions. As a leading treatise explains, modern application of estoppel and waiver in the present context serves 'as an antidote to the earlier approach, which was the highly conceptual one of saying that timely claim (and sometimes even notice) was "jurisdictional[.]" ' *Larson's* [*Workers' Compensation Law*], 7 § 126.13[1]. Defendants' argument tracks this 'jurisdictional' approach, and relies entirely on cases decided before the adoption of modern principles of waiver and estoppel designed to ameliorate its harsh effects. The overwhelming majority of modern cases 'belie[ ] the present validity of the ["jurisdictional"] idea,' however, which continues to survive in only a tiny minority of jurisdictions amidst strong criticism. *See*, *e.g.*, *id.* (describing the minority rule as 'curious word-magic' designed to exalt the statutory claims' filing requirement as 'a defense outside the reach of waiver, estoppel, or anything else'). To be sure, *Biddix* and *Belfield* have made clear that this outdated procedural hurdle has no place in our modern jurisprudence.

Id. at 38, 653 S.E.2d at 407–08 (first, third, and fourth alterations in original) (referencing *Biddix v. Rex Mills, Inc.*, 237 N.C. 660, 75 S.E.2d 777 (1953); *Belfield v. Weyerhaeuser Co.*, 77 N.C. App. 332, 335 S.E.2d 44 (1985)).

¶ 44 We then noted that N.C.G.S. § 97-24 "has repeatedly been held to be a condition precedent to the right to compensation." *Id.* at 38, 653 S.E.2d at 408 (citing *Montgomery*, 265 N.C. at 555, 144 S.E.2d at 587). We also noted that this Court has "long held that a condition precedent, unlike subject matter jurisdiction, may be waived by the beneficiary party by virtue of its conduct." *Id.* Thus, we held that the timely filing requirement under N.C.G.S. § 97-24 was not jurisdictional and that a "defendant[ ] could waive the two[-]year condition precedent laid out in N.C.G.S. § 97-24." *Id.*

¶ 45 Nonetheless, the majority "resurrect[s this] antiquated [jurisdictional] approach," *id.* at 38, 653 S.E.2d at 407, because, in its view, the timely filing requirement "implicates the subject-matter jurisdiction of the Commission." Jurisdiction, however, "rests upon the law and the

law alone. It is never dependent upon the conduct of the parties." *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006) (quoting *Feldman v. Feldman*, 236 N.C. 731, 734, 73 S.E.2d 865, 867 (1953)). The Industrial Commission's jurisdiction "is limited and conferred by statute." *Pearson v. C.P. Buckner Steel Erection Co.*, 348 N.C. 239, 241, 498 S.E.2d 818, 819 (1998). Though a party invokes the Industrial Commission's authority by timely filing a claim, the party does not confer jurisdiction upon the Industrial Commission. *See Letterlough v. Atkins*, 258 N.C. 166, 168, 128 S.E.2d 215, 217 (1962) (stating that the Industrial Commission's "jurisdiction may not be enlarged or extended by act or consent of the parties, nor may jurisdiction be conferred by agreement or waiver"). Accordingly, whether a party timely filed is not a jurisdictional question. Moreover, holding that the timely filing requirement is jurisdictional theoretically seems to put it beyond the reach of estoppel. *See Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 88, 92 S.E.2d 673, 676 (1956) ("Jurisdiction [of the Industrial Commission] cannot be obtained by consent of the parties, waiver, or estoppel."). Though the majority claims their approach is "consistent with the Act's legislative purpose" of "providing compensation for injured employees," *Gore*, 362 N.C. at 36, 653 S.E.2d at 406, it could in fact work to hinder that purpose. Broadening appellate judicial authority to allow de novo fact finding brings increased uncertainty to the process.

¶ 46 Under the proper standard of review, the Full Commission's finding that defendant did not pay for medical treatment related to plaintiff's 27 May 2014 injury beyond April of 2015 was supported by competent evidence. That finding, in turn, supported the conclusion of law that plaintiff's claim was barred because she did not timely file her claim. Accordingly, this Court should reverse the Court of Appeals, which reversed the Full Commission's dismissal of plaintiff's claim. I respectfully dissent.

Justice BARRINGER joins in this dissenting opinion.

IN RE A.N.H.

[381 N.C. 30, 2022-NCSC-47]

IN THE MATTER OF A.N.H.

No. 123A21

Filed 6 May 2022

1. Termination of Parental Rights—findings of fact—sufficiency of evidence—compliance with case plan

In an appeal from an order terminating a father's parental rights in his daughter, many of the trial court's findings of fact were disregarded because they lacked the support of clear, cogent, and convincing evidence—including findings that the father failed to comply with portions of his case plan, that he lied about his drug use, that he failed to demonstrate the ability to provide appropriate care for his daughter, that he was in arrears in child support payments, and that he failed to seek assistance to find appropriate housing.

2. Termination of Parental Rights—grounds for termination—neglect—failure to make reasonable progress—compliance with case plan—some drug use

An order terminating a father's parental rights on the grounds of neglect and failure to make reasonable progress was vacated and remanded where, after unsupported factual findings were disregarded, the remaining factual findings showed that the father complied with almost all of the requirements of his case plan, and no findings supported a conclusion that his continued drug use would result in the impairment or a substantial risk of impairment of his daughter.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from order entered on 19 January 2021 by Judge Emily Cowan in District Court, Henderson County. This matter was calendared in the Supreme Court on 18 March 2022 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Assistant County Attorney Susan F. Davis for petitioner-appellee Henderson County Department of Social Services.

Ryan H. Niland and John R. Still for Guardian ad Litem.

Edward Eldred for respondent-appellant father.

IN RE A.N.H.

[381 N.C. 30, 2022-NCSC-47]

EARLS, Justice.

¶ 1 Respondent-father appeals from a trial court order terminating his parental rights in his daughter, A.N.H. (Annie).[1] Respondent was found by the trial court to have completed a required substance abuse assessment, completed 20 hours of substance abuse treatment, completed a parenting program, attended 78 of 80 possible visits with Annie, paid child support in an amount consistent with the child support guidelines, resided in a home safe and appropriate for Annie, attended court regularly, and maintained requested contact with the social worker. Petitioners sought to terminate respondent's parental rights based on the fact that respondent failed some of the many drug screens he submitted to between 2018 and 2020 and failed to submit to others.

¶ 2 We find that some of the trial court's findings of fact are not supported by the record, while others are. Thus, the issue here is whether the findings of fact that are supported by clear, cogent, and convincing evidence in the record are sufficient to support the trial court's conclusion that grounds existed to terminate respondent's parental rights for neglect and failure to make reasonable progress under the circumstances to correct the conditions that led to Annie's placement in foster care. We conclude that the findings of fact supported by clear, cogent, and convincing evidence in the record are insufficient to support the trial court's conclusion that respondent's parental rights in Annie were subject to termination. Accordingly, consistent with our precedents, we remand this matter for further proceedings rather than reversing the judgment and remanding for dismissal of the petition. *See In re N.D.A.*, 373 N.C. 71, 84 (2019) (vacating and remanding for further proceedings where factual findings were insufficient to support grounds for termination).

I. Background

¶ 3 When Annie was born on 9 April 2018, her cord blood tested positive for cocaine, and she experienced suboxone withdrawal. Annie spent two weeks in the hospital being treated with methadone before being discharged to the custody of her mother. On 24 April 2018, the mother entered into a safety plan with Henderson County Department of Social Services (HCDSS) in which she agreed to continue with her substance abuse treatment and to reside with Annie at the maternal grandmother's home.

1. We use a pseudonym to protect the juvenile's identity and for ease of reading.

¶ 4 Around 13 May 2018, the mother moved with Annie to temporary housing with a friend after being kicked out of the maternal grandmother's home. The mother missed multiple substance abuse group therapy sessions throughout May 2018 and was discharged from her suboxone treatment on 4 June 2018 after failing to attend her treatment.

¶ 5 On 5 June 2018, HCDSS filed a petition alleging Annie to be a neglected juvenile. The petition alleged that the mother did not have stable income, was unemployed, and was not attending treatment for her substance abuse or mental health issues. Respondent was not listed on Annie's birth certificate. He was listed as the putative father on the petition, in which it was alleged that respondent provided no care or support for Annie, was unemployed, and had a history of criminal activity, drug use, and domestic violence with Annie's mother.

¶ 6 In early July 2018, the mother could no longer stay with her friend. On 10 July 2018, she and Annie spent the night at respondent's home; they spent the next two nights at the Rescue Mission. On 13 July 2018, HCDSS was unable to locate the mother or Annie. The social worker contacted respondent looking for the mother, but respondent did not have any information regarding her whereabouts. HCDSS located Annie later that day in the care of respondent and his family. At this point paternity had not yet been established.

¶ 7 HCDSS obtained nonsecure custody of Annie on 13 July 2018 and filed a supplemental petition alleging neglect. The petition alleged that the mother expressed concern about respondent being left alone with Annie because of his domestic violence history. Respondent submitted to paternity testing on 30 July 2018 and was found to have a 99.99% probability of being Annie's father. In a child support order filed on 28 September 2018, respondent acknowledged that he was Annie's father.

¶ 8 Following a hearing, the trial court entered a Consent Adjudication Order on 13 September 2018 concluding that Annie was a neglected juvenile based on the parents' stipulated facts. In a separate disposition order entered 17 January 2019, the trial court ordered respondent to do the following in order to achieve reunification with Annie: obtain a comprehensive clinical assessment (CCA) from a certified provider and provide the assessor with truthful and accurate information; follow and successfully complete all the recommendations of the CCA; submit to random drug screens; complete an anger management/domestic violence prevention program; successfully complete a parenting class that addresses the ability to identify age-appropriate behaviors, needs, and discipline for the juvenile; cooperate and pay child support; attend visitations and demonstrate the ability to provide appropriate care for

the juvenile; obtain stable income sufficient to meet the family's basic needs; obtain and maintain an appropriate and safe residence; maintain face-to-face contact with HCDSS; and provide HCDSS with updated information and sign any releases of information necessary to allow the exchange of information between HCDSS and the providers. The court granted respondent one hour of supervised visitation per week.

¶ 9 The trial court held a permanency planning hearing on 11 April 2019. In an order entered 17 May 2019, the court set the permanent plan for Annie as reunification with a secondary plan of adoption. The court found that respondent obtained a CCA, completed a parenting class, obtained sufficient income, and began mental health treatment on 7 November 2018. From July 2018 to the date of the hearing, respondent submitted to nine drug screens, seven of which were negative. However, respondent tested positive for marijuana on 18 July and 23 October 2018 and did not take requested drug screens on 28 August 2018 and 8 January 2019. The court ordered respondent to comply with the components of his case plan and allowed him six hours of unsupervised visitation per week.

¶ 10 On 3 June 2019, HCDSS filed a Motion for Review requesting respondent's visitation be changed back to supervised visits after respondent's 21 May 2019 hair follicle test came back positive for amphetamines, methamphetamines, and cocaine. Following a hearing on 11 July 2019, the trial court entered an order on 3 September 2019 continuing the permanent plans.

¶ 11 Respondent himself requested additional hair follicle tests on 25 and 26 September and 2 October 2019. However, respondent testified that he could not submit samples for these tests because he was working two hours away in Maggie Valley and could not get to the testing site before it closed. On 10 October 2019, a second hair follicle test came back positive for methamphetamine, cocaine, and benzoylecgonine, the main metabolite of cocaine. Respondent's unsupervised visitation was suspended on 15 October 2019 due to his positive hair follicle screens.

¶ 12 In a review order entered 14 February 2020, the trial court changed the permanent plan to adoption with a secondary plan of guardianship, finding that respondent had not made adequate progress within a reasonable time under the plan. The court found that respondent had not engaged with individual therapy to comply with his substance abuse requirements, and that he was extremely dependent on his grandmother for assistance in caring for Annie. The court also found that respondent had threatened family members who offered to help with Annie or provide information to HCDSS about Annie. The court allowed respondent a minimum of one hour of supervised visitation per week.

¶ 13 On 12 March 2020, HCDSS filed a motion to terminate respondent's parental rights on the grounds of neglect and willful failure to make reasonable progress to correct the conditions that led to Annie's removal from the home.[2] N.C.G.S. § 7B-1111(a)(1)–(2) (2021). Following multiple continuances, the trial court held a termination of parental rights hearing on 15 October, 12 November, and 10 December 2020. On 19 January 2021, the trial court entered an order concluding that HCDSS had proven both alleged grounds to terminate respondent's parental rights and that termination of respondent's parental rights was in Annie's best interests. Accordingly, the trial court terminated respondent's parental rights. Respondent appealed.

II. Analysis

¶ 14 On appeal, respondent challenges the trial court's adjudication of grounds for termination of his parental rights under N.C.G.S. § 7B-1111(a)(1) and (2). He contends that of the twenty-seven findings of fact relied upon by the trial court, the entirety of finding of fact 38 and significant portions of eleven others are not supported by the evidence and that the remaining findings do not support the trial court's conclusions that grounds existed to terminate his rights.

¶ 15 We review a trial court's adjudication that grounds exist to terminate parental rights "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re E.H.P.*, 372 N.C. 388, 392, (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111 (1984)). "A trial court's finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding." *In re R.G.L.*, 2021-NCSC-155, ¶ 12. "Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407, (2019) (citing *Koufman v. Koufman*, 330 N.C. 93, 97 (1991)). "Moreover, we review only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." *Id.* "The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 373 N.C. 16, 19 (2019).

¶ 16 A trial court may terminate parental rights if it concludes that the parent has neglected the juvenile within the meaning of N.C.G.S.

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2. HCDSS also sought to terminate the parental rights of Annie's mother, but she did not appeal and is not a party to this appeal.

§ 7B-101. N.C.G.S. § 7B-1111(a)(1). A neglected juvenile is defined, in pertinent part, as one "whose parent, guardian, custodian, or caretaker . . . does not provide proper care, supervision, or discipline . . . [or whose parent, guardian, custodian, or caretaker] allows to be created a living environment that is injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2021).

> Termination of parental rights based upon this statutory ground requires a showing of neglect at the time of the termination hearing or, if the child has been separated from the parent for a long period of time, there must be a showing of a likelihood of future neglect by the parent. When determining whether such future neglect is likely, the district court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing.

In re R.L.D., 375 N.C. 838, 841 (2020) (cleaned up).

¶ 17 A trial court also may terminate parental rights if it concludes that a parent has willfully left his or her child in foster care or in a placement outside the home for more than twelve months "without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C.G.S. § 7B-1111(a)(2). In order for a respondent's noncompliance with a case plan to support termination of parental rights, there must be a nexus between the components of the court-approved case plan allegedly not met and the conditions which led to the child's removal from the home. *In re B.O.A.*, 372 N.C. 372, 387 (2019). The "reasonable progress" standard does not require respondent "to completely remediate the conditions that led to" the child's removal. *In re J.S.*, 374 N.C. 811, 819 (2020).

¶ 18 Respondent contends that the trial court's findings that are supported by the record evidence do not support its determination that there was a likelihood of future neglect and do not support the determination that he failed to make reasonable progress to correct the conditions that led to Annie's removal. Because the trial court's legal conclusions regarding both grounds for termination were based on the same facts, we will first examine respondent's contentions regarding the trial court's findings and then analyze the two grounds for termination found by the trial court.

A. Findings of Fact

¶ 19 **[1]** In support of its determination that respondent's parental rights were subject to termination based on neglect and failure to make reasonable progress, the court made the following pertinent findings of fact:

> 29. Father has failed to make reasonable progress under the circumstances in correcting those conditions which led to the removal of the juvenile or on the requirements to obtain placement and custody of the juvenile. Specifically, father has not made significant or reasonable progress on his case plan in the past two and one-half years as shown by the following:
>
> a. Father completed his [CCA] through Family Preservation Services on 4 June 2019 and was recommended to successfully complete substance abuse treatment and individual therapy. Father was also recommended to abstain from all illicit substances.
>
> b. Father was referred to Highland Medical, but Highland Medical would not accept his insurance. Therefore, HCDSS referred father back to Family Preservation Services to obtain a Substance Abuse assessment. Instead of obtaining a substance abuse assessment at Family Preservation Services, Father indicated he would pay for half of the cost if HCDSS would pay for half the cost, and HCDSS agreed.
>
> c. Father obtained a substance abuse assessment with A New Day on 15 October 2019 was to provide the assessor with truthful and accurate information and was to complete all recommendations of the Substance Abuse assessment. Father denied use of illegal substances and did not disclose that he submitted to a random hair follicle test on 21 May 2019 that was positive for amphetamines, methamphetamines, and cocaine.
>
> d. Father was recommended to complete sixteen (16) hours of a short term substance abuse program. Father completed twenty (20) hours of Substance Abuse Treatment on 10 December 2019. Father was also recommended to abstain from all illicit substances. Father was sent to Blue Ridge Community

Health Services, Inc. and was seen by Barry Beavers for individual counseling and left in good standing in the fall of 2019, to be seen on an "as needed" basis.

e. Father contacted HCDSS on 21 July 2020 asking for a referral for another CCA. The social worker referred father to DC Wellness and Behavioral Health. Father did not go to DC Wellness and Behavioral Health and texted the social worker on 3 August 2020 to tell HCDSS he had obtained a SAA at October Road in Asheville. Father's new SAA has been delivered to HCDSS, and Father testified the S[A]A had no recommendations for needed services.

. . . .

g. Although there were numerous positive tests for illegal substances and the main metabolite for cocaine was found in father's results, father, in each substance abuse assessment, in the CCA, and in testimony at the TPR hearing, denied ever using illegal substances while providing no other evidence as to how such positive results were returned multiple times.

h. Father has completed the domestic violence intervention program at Safelight, a provider acceptable to HCDSS.

i. Father completed a parenting program with Safelight, a provider acceptable to HCDSS.

j. Father is paying Child Support through the Child Support Enforcement Agency in an amount consistent with the guidelines. Father's last payment was 14 September 2020, and Father is in arrears One Hundred and Nineteen Dollars and eight cents ($119.08).

. . . .

l. Father has attended seventy eight (78) visits with the juvenile out of a possible eighty (80) visits. The two visits father missed were in 2018. Father was on time for his visits with the juvenile, and father's visits with the juvenile were never cut short. From 17 May 2019 to 14 February 2020, the Court had ordered father to have unsupervised visitation with the juvenile which

went well until the unsupervised visitation ended on 15 October 2019 with father's positive hair follicle screen. A motion to address the change in visitation was not filed due to the next Permanency Planning and Review Hearing being already scheduled within thirty (30) days. Father never attended a single visit alone as the juvenile's grandmother . . . was always present at the visitations. [The grandmother] is part of father's support network, and her time with the juvenile was appropriate. However, father has never cared for or attempted to care for the juvenile on his own without the presence of a third party. Therefore, the father has not demonstrated the ability to provide appropriate care for the juvenile.

m. Father was employed at JB's Heating and Cooling, but father was laid off in September of 2019 and stated he started back working there three weeks later. On 17 December 2019, father stated he had been laid off from JB's Heating and Cooling and was looking for a job. Father was unemployed from 17 December 2019 to July of 2020. Father states he has now gone back to work at JB's Heating and Cooling and provided the social worker a check stub on 30 July 2020. Social Worker called and verified that Father is employed at JB's Heating and Cooling on 5 October 2020. Father testified at the TPR Hearing that he was employed but was waiting for a call to go to work. Therefore, father's employment has been sporadic over the time this case has been in Court, and said employment has not been consistent. Father cannot say he is working full time as he is waiting for a call from JB's Heating and Cooling for him to come into work.

n. Father is residing with his Aunt, and the Aunt's home is safe and appropriate. . . .

. . . .

30. Father did not have a driver's license when the matter was filed but has since obtained a driver's license.

31. Mother and father are not currently in a relationship with each other.

32. The father told the assessor for the New Day CCA that father had never used illegal substances, and that CCA returned no recommendations for father. Father admitted to substance abuse use in the consent Adjudication Order and has multiple positive drug screens for Marijuana, Amphetamines, Methamphetamines, Cocaine, and benzoylecgonine, the main metabolite of cocaine, during the course of this case. The Court finds the CCA at New Day and the others where father denied use of illegal substances to be invalid as truthful and accurate information was not given to the assessor.

33. Father did not complete intensive out-patient substance abuse treatment which was ordered in the original CCA. Father's 16-hour classes does not qualify as intensive out-patient substance abuse treatment, and father has not completed this recommendation of the CCA.

. . . .

35. The adjudication order found father to have admitted to drug use as an issue leading to the juvenile being declared a neglected juvenile as defined under N.C.G.S. § 7B-101(15). The disposition order documents and found that, with regard to the father, . . . there were issues of the use of alcohol and/or controlled or illegal substances and/or mental health issues by a parent and that part of the case plan father had to successfully complete to obtain return of the juvenile was to obtain a [CCA], provide truthful information to the assessor, submit to random drug screens, and follow all recommendations of the comprehensive clinical assessment-which included remaining free of illicit substances.

36. Father did not complete individual therapy, did not complete intensive out-patient substance abuse therapy, and denied any illicit drug use in court and to the assessor performing the CCA while testing positive for Amphetamines, Methamphetamines, Cocaine, and benzoylecgonine, the main metabolite of Cocaine.

> 37. Father has not addressed the issues of the use of alcohol and/or controlled or illegal substances and/or mental health issues by a parent as he has not shown substantial progress in a reasonable amount of time and has not completed, to the satisfaction of the court, the first three requirements of his case plan:
>
> i. Father shall obtain a [CCA] from a certified provider acceptable to HCDSS and provide the assessor with truthful and accurate information;
>
> ii. Father shall follow and successfully complete all the recommendations of the [CCA]; or
>
> iii. Father shall submit to random drug screens.

The court also found that respondent tested positive for marijuana on 18 July and 23 October 2018; tested positive for amphetamines, methamphetamines, and cocaine on 21 May and 10 October 2019, and 1 September 2020; and tested positive for benzoylecgonine, the main metabolite of cocaine, on 10 October 2019 and 1 September 2020. Respondent also failed to submit to three urine drug screens requested by HCDSS and did not submit samples for three hair follicle screens that he had requested on 25 and 26 September and 2 October 2019. The trial court further documented the ten drug screens respondent completed during this period that showed a negative result.

¶ 20 Respondent first challenges the trial court's findings that he denied illegal substance use during his assessments and failed to provide truthful and accurate information to the assessors. Specifically, respondent challenges the portions of finding of fact 29(c) stating that he denied use of illegal substances during his substance abuse assessment with A New Day on 15 October 2019 and failed to disclose to New Day that he submitted to a random hair follicle test on 21 May 2019 that was positive for amphetamines, methamphetamines, and cocaine. Respondent also challenges the portions of findings of fact 29(g) and 36 stating that "in each substance abuse assessment, [and] in the CCA" respondent "denied ever using illegal substances" and denied any illicit drug use "to the assessor performing the CCA." Respondent argues the evidence and testimony about New Day's recommendation for basic substance abuse treatment contradicts the finding that he denied illegal substance use during the assessment. He also contends that there is no evidence he did not disclose the 21 May 2019 hair follicle test to New Day, or that he denied illegal substance use in the CCA and his assessments with New Day and October Road. Respondent argues that although the social worker

testified October Road did not know about a hair follicle test respondent took after completing the assessment, there is no testimony regarding anything respondent "said or did not say to the assessor *during* the assessment."

¶ 21 The social worker testified that respondent completed a substance abuse assessment with New Day on 15 October 2019, which recommended respondent complete sixteen hours of a short-term substance abuse program. She further testified that respondent completed the New Day twenty-hour substance abuse program on 10 December 2019. Respondent also testified that the New Day assessment recommended basic substance abuse treatment and that his assessment with October Road had no recommendations.

¶ 22 Because the undisputed evidence shows New Day recommended basic substance abuse treatment, it would be unreasonable to infer that respondent denied the use of illegal substances to New Day. *See In re N.P.*, 374 N.C. 61, 65 (2020) ("The [trial] court has the responsibility of making all reasonable inferences from the evidence presented."). Additionally, there is no evidence or testimony regarding respondent's disclosures to New Day or any other assessment, and thus no evidence that respondent failed to disclose the positive results of his 21 May 2019 hair follicle test during the New Day assessment, or that he denied using illegal substances during each substance abuse assessment and CCA.

¶ 23 HCDSS cites to the GAL report as support for the trial court's findings. However, the GAL report was admitted into evidence during the dispositional hearing "to support best interest[s]" after the trial court had already rendered its adjudicatory decision. As a result, the report cannot be used as competent evidence to support the trial court's adjudicatory findings. *See In re Z.G.J.*, 378 N.C. 500, 2021-NCSC-102, ¶ 28 ("[W]e have previously held that dispositional evidence cannot be used to support the trial court's adjudicatory determinations." (citing *In re Z.J.W.*, 2021-NCSC-13, ¶ 17)).[3] Thus, we must disregard the challenged portions of findings 29(c), (g), and 36. *See In re S.M.*, 375 N.C. 673, 691 (2020).

¶ 24 The second sentence of finding of fact 29(j) finds that respondent last made a child support payment on 14 September 2020 and that he was in arrears in the amount of $119.08. Respondent is correct that there was no testimony or other evidence in the record that respondent had

3. HCDSS's court report was not admitted into evidence at the hearing and is not included in the record on appeal.

any arrearage. The social worker testified that respondent "pays his child support" and that respondent "satisfied that part of his case plan on paying child support." HCDSS concedes that the only evidence in this case is that respondent paid his child support. Thus, the second sentence of this finding must be disregarded as unsupported by the evidence.

¶ 25 Respondent challenges the portion of finding of fact 29(l) stating that he has "not demonstrated the ability to provide appropriate care" for Annie. Respondent asserts that the evidence shows he was appropriate during every visit with Annie and that no visits were cut short due to any problematic behavior. He contends that he demonstrated he could take care of Annie because the trial court allowed him unsupervised visits in May 2019.

¶ 26 The fact that respondent was approved for unsupervised visitation at a prior hearing did not preclude the trial court from later finding that he has not demonstrated the ability to provide appropriate care. Respondent's supervised visitation was suspended after he twice tested positive for amphetamines, methamphetamines, and cocaine, but there is no evidence in the record that he was ever in Annie's presence while under the influence of any drug. The social worker testified that respondent's visits went well and that he played with age-appropriate toys with Annie. The evidentiary support for the trial court's conclusion that respondent had not shown the ability to care for Annie is thin at best and falls short of the clear, cogent, and convincing evidence standard that we must apply.

¶ 27 Findings of fact 29(n) and 29(q) relate to whether respondent appropriately sought help with housing. Respondent correctly notes that there was no evidence in the record concerning respondent's contacts with Thrive, WCCA, or Hendersonville Housing Authority regarding housing assistance. HCDSS concedes this point and argues that it is in any event irrelevant because of the uncontradicted record testimony from the social worker that the residence where respondent was currently living was appropriate for Annie. Therefore, we must disregard any implication that respondent failed to make reasonable efforts to find suitable housing for Annie. To the extent that it relates to whether the conditions that led to Annie's removal have been addressed, the record evidence indicates that respondent had obtained a safe and suitable living situation.

¶ 28 Respondent challenges the portion of finding of fact 32 stating that he told the assessor for the New Day CCA that he had never used illegal substances and the CCA returned no recommendations. The evidence and unchallenged findings show that respondent obtained CCAs

from Family Preservation Services and October Road and obtained a substance abuse assessment through New Day. Both the social worker and respondent testified that the CCA from October Road had no substance abuse recommendations for respondent. Thus, we disregard this finding insomuch as it suggests the CCA without recommendations was obtained from New Day.

¶ 29 Respondent also challenges the portion of finding of fact 32 in which the court found that the CCAs where respondent denied use of illegal substances were invalid "as truthful and accurate information was not given to the assessor." Respondent argues the evidence does not support the finding that he did not give "truthful and accurate" information during any assessment. We agree. As stated previously, there is no adjudicatory evidence or testimony about respondent's disclosures during his assessments. Although both the social worker and respondent testified that the October Road CCA did not have any recommendations, it does not necessarily follow that respondent did not provide truthful information to the assessor. As a result, we disregard this portion of finding of fact 32.

¶ 30 Respondent challenges the portion of finding of fact 33 stating that intensive outpatient substance abuse treatment was ordered in the original CCA, and that respondent failed to complete this recommendation. Respondent argues that there is conflicting evidence regarding the recommendations from the first CCA, and that "while there is some evidence, in the form of the social worker's testimony, that [respondent] was recommended to complete intensive outpatient at some point during this case, the clear and convincing evidence is that [respondent] was recommended to complete 'basic' substance abuse treatment."

¶ 31 The social worker testified that respondent completed a CCA through Family Preservation Services on 4 June 2019, and "another one" with October Road in August 2020 which "did not have any recommendations." During direct examination, the social worker testified that the 4 June 2019 CCA recommended "basic substance abuse treatment and individual therapy." However, during later questioning from the trial court, the social worker testified that respondent "originally was recommended to go through the intensive outpatient program[,]" but completed the New Day substance abuse classes instead, and that those classes were not equivalent to intensive outpatient treatment. Based on this testimony, there is evidence respondent was "originally" recommended to go to intensive outpatient treatment and did not do so. Thus, we uphold that portion of the finding. However, the evidence does not show that the recommendation was necessarily from the CCAs respondent

completed on 4 June 2019 or August 2020. As there is no other evidence of any additional CCA's completed by respondent, we disregard the finding to the extent that it indicates the recommendation for intensive outpatient therapy was from a CCA.

¶ 32 Respondent also challenges the part of finding of fact 36 stating that respondent "did not complete individual therapy[.]" Respondent asserts that this finding is contradicted by finding of fact 29(d), which found that respondent left individual counseling "in good standing in the fall of 2019, to be seen on an 'as needed' basis." We agree. The social worker acknowledged during cross-examination that the therapist's letter recommended respondent continue with individual therapy "as needed." Because the record reflects that respondent completed individual therapy "in good standing" and there was no evidence respondent required further "as needed" therapy, we disregard the portion of finding of fact 36 finding that respondent did not complete individual therapy.

¶ 33 Respondent next challenges finding of fact 37. He first takes exception to the portion of the finding stating that he did not address the issues of alcohol use or mental health. Respondent argues there is no evidence that alcohol use was an issue for respondent. The social worker testified that the issues respondent needed to address before reunification could occur included "substance abuse and mental health of a parent." There is no testimony or evidence that respondent had any issues with alcohol during the case. Therefore, we disregard the portion of finding of fact 37 to the extent it suggests respondent had issues with alcohol use and failed to address those issues.

¶ 34 Respondent also challenges the portion of finding of fact 37 stating that he did not complete the first three requirements of his case plan. Respondent argues that the evidence establishes he completed a CCA with an acceptable provider and that the CCA recommended "basic substance abuse treatment and individual therapy." Respondent again argues there is no evidence to support a finding that he did not provide truthful information during his CCA. He further argues that he completed twenty hours of substance abuse treatment, left individual counseling in good standing, and failed to submit to only three of the eighteen requested drug screens.

¶ 35 The unchallenged findings show that respondent completed a CCA with Family Preservation Services on 4 June 2019, which recommended respondent complete substance abuse treatment and individual therapy and abstain from using illicit substances. However, respondent tested positive for amphetamines, methamphetamines, and cocaine on three

occasions. Respondent also failed to submit to three drug screens requested by HCDSS and to three hair follicle screens that he requested. The social worker testified that respondent initially was ordered to complete intensive outpatient substance abuse treatment and failed to do so. Thus, the evidence and other findings support the finding that respondent did not follow and successfully complete all of the recommendations from his CCA and failed to submit to all random drug screens. But, as stated previously, there is no evidence regarding what disclosures respondent may or may not have made to the assessors. Accordingly, we disregard the portion of the finding specifying that respondent did not complete the requirement that he provide the assessor with truthful and accurate information.

¶ 36 Respondent contends that there is no evidentiary support whatsoever in the record for the entirety of finding of fact 38, which finds that he failed to participate in most permanency planning action team (PPAT) meetings between 2018 and 2020. Respondent is correct that there was no testimony about PPAT meetings at any point during the hearing. Indeed, finding of fact 29 states that respondent "has maintained face to face visits with the social worker as may have been limited by the COVID-19 pandemic. As limited by the pandemic, father has maintained other contact, as requested and has attended court regularly." Additionally, the trial court made the following finding of fact in every permanency planning order: "[f]ather maintains face-to-face contact with the Social Worker as requested, including but not limited to Child & Family Team Meetings and Permanency Planning Meetings." Neither HCDSS nor the Guardian ad litem makes any response to this contention. Respondent is correct that there is no factual basis for finding of fact 38 and it must be disregarded.

¶ 37 In sum, we uphold as supported by the evidence the findings that respondent failed to go to intensive outpatient treatment as ordered and failed to successfully complete all recommendations from his CCA. We disregard as unsupported by the evidence the court's findings that respondent denied use of illegal substances during his New Day assessment, failed to complete individual therapy, failed to provide "truthful and accurate" information to the assessors, failed to attend PPAT meetings, failed to demonstrate the ability to provide appropriate care for Annie, was in arrears in child support payments, and failed to seek assistance to find appropriate housing.

¶ 38 Having reviewed respondent's challenges to the trial court's relevant findings of fact, we next consider the trial court's adjudication of grounds for termination.

B. Grounds for Termination

¶ 39 **[2]** Respondent argues the trial court erred in concluding grounds existed to terminate his parental rights under N.C.G.S. § 7B-1111(a)(1) because the trial court's remaining findings of fact do not support its determination of a likelihood of repetition of neglect if Annie were placed in respondent's care. Respondent contends that the court's conclusions that grounds existed "are based almost entirely on a finding not supported by any evidence: that [respondent] gave untruthful information in the CCA and in the substance use assessments." We agree.

¶ 40 "A parent's failure to make progress in completing a case plan is indicative of a likelihood of future neglect." *In re M.A.*, 374 N.C. 865, 870 (2020) (quoting *In re M.J.S.M.*, 257 N.C. App. 633, 637 (2018)). At the same time, "a parent's compliance with his or her case plan does not preclude a finding of neglect." *In re J.J.H.*, 376 N.C. 161, 185 (2020) (citing *In re D.W.P.*, 373 N.C. 327, 339–40 (2020) (noting the respondent's progress in satisfying the requirements of her case plan while upholding the trial court's determination of a likelihood of future neglect because the respondent had failed "to recognize and break patterns of abuse that put her children at risk")); *see also In re Y.Y.E.T.*, 205 N.C. App. 120, 131 (explaining that a "case plan is not just a check list" and that "parents must demonstrate acknowledgment and understanding of why the juvenile entered DSS custody as well as changed behaviors"), *disc. review denied*, 364 N.C. 434 (2010). In this case, however, respondent actually complied with almost all of the requirements of his case plan. At the time Annie was removed from respondent's custody, he had not yet established paternity and the consent adjudication of neglect identified the mother's drug use, not his, as the condition needing remediation. By the time the termination petition was filed, respondent had visited with Annie on 78 occasions, was paying child support, had a home she could live in, had completed substance abuse, domestic violence, and parenting programs, and had addressed the conditions that led to Annie's placement in HCDSS's custody.

¶ 41 To be sure, respondent's substance abuse was recognized as a concern from the initiation of the case, and he was required to address it as part of his case plan. Respondent completed twenty hours of basic substance abuse treatment (four hours more than required by the assessment), but he also continued to test positive for amphetamines, methamphetamines, and cocaine on occasion after completing that treatment, and he denied using methamphetamine or any other drug at the termination hearing despite those positive test results. Respondent's denial of drug use despite the positive drug screens is some support

for the trial court's finding that he failed to completely address his substance abuse issues. But given the trial court's other findings of fact that are supported by the evidence, this says very little about his ability to parent his daughter. There are no findings to support the conclusion that respondent's drug use will result in "some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment . . . ." *In re Stumbo*, 357 N.C. 279, 283 (2003); *cf. In re K.B.*, 378 N.C. 601, 2021-NCSC-108, ¶ 22 (affirming termination order on ground of neglect where "the trial court made express findings that [the juveniles] were impaired or at a substantial risk of impairment as a result of respondent mother's neglect"). Thus, disregarding the trial court's findings that were not supported by evidence in the record, the trial court's conclusion that Annie would likely be neglected if returned to her father's care is not supported by the remaining findings of fact. As a result, the trial court's order adjudicating neglect as a ground for termination of respondent's parental rights under N.C.G.S. § 7B-1111(a)(1) must be vacated.

¶ 42 Similarly, given the remaining findings of fact, we cannot conclude that a ground exists for termination under N.C.G.S. § 7B-1111(a)(2). The remaining findings indicate some positive drug screens but also reflect respondent's completion of most of the other requirements of respondent's case plan, including having employment and suitable housing; paying child support; attending almost all visitations; and completing substance abuse, domestic violence, and parenting programs. On these undisturbed findings, we cannot conclude that respondent failed to make reasonable progress towards correcting the conditions that led to Annie's removal. *Cf. In re J.M.*, 373 N.C. 352, 356 (2020) (affirming order terminating parental rights where "[t]he record is clear that at the time of the termination hearing . . . [respondent-mother] had failed to comply with the services outlined for her to complete").

¶ 43 Therefore, we hold that the trial court's findings of fact are insufficient to support its determination that respondent's parental rights in Annie were subject to termination on the grounds of neglect and failure to make reasonable progress in correcting the conditions that led to her removal from his custody.[4] We vacate the trial court's termination order

4. As a prudential matter, a remand under these circumstances is appropriate because adjudicating the asserted grounds requires making various fact-intensive subjective judgments, such as whether respondent exhibited "reasonable progress under the circumstances" and whether there existed a "substantial probability of the repetition of such neglect." Because we cannot say with certainty whether the erroneous factual findings were central or incidental to the trial court's ultimate resolution of these questions, a remand ensures that these questions are answered by the trial court, the tribunal tasked with "assign[ing] weight to particular evidence and . . . draw[ing] reasonable inferences therefrom." *In re K.L.T.*, 374 N.C. 826, 843 (2020).

and remand this case to the District Court, Henderson County for further proceedings consistent with this opinion. In its discretion, the trial court may receive additional evidence on remand. *See In re T.M.H.*, 186 N.C. App. 451, 456 (2007).

VACATED AND REMANDED.

IN THE MATTER OF B.E.V.B.

No. 328A21

Filed 6 May 2022

Termination of Parental Rights—grounds for termination—willful abandonment—sufficiency of findings

The trial court properly terminated a father's parental rights to his daughter on the ground of willful abandonment (N.C.G.S. § 7B-1111(a)(7)) where its findings, which were supported by clear, cogent, and convincing evidence, showed respondent's willful intention to forego all parental responsibilities by his complete lack of contact with his daughter for far longer than the determinative six-month period, his failure to inquire about the child by contacting her mother despite having multiple avenues to do so, and his written response to the mother that he was unwilling to provide any financial support.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review orders entered on 1 March 2021 and 26 April 2021 by Judge Pauline Hankins in District Court, Brunswick County. This matter was calendared for argument in the Supreme Court on 18 March 2022 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

James W. Lea III for petitioner-appellee mother.

Anné C. Wright for respondent-appellant father.

BARRINGER, Justice.

IN RE B.E.V.B.

[381 N.C. 48, 2022-NCSC-48]

¶ 1 Respondent petitioned the Court to review orders terminating his parental rights to his minor child B.E.V.B. (Becky).[1] According to respondent, the trial court wrongly adjudicated that a ground existed to terminate his parental rights due to willful abandonment pursuant to N.C.G.S. § 7B-1111(a)(7). After careful review, we hold that the trial court did not err in adjudicating that this ground existed. Accordingly, we affirm the trial court's orders terminating respondent's parental rights.

I. Factual and Procedural Background

¶ 2 At the time of Becky's birth in 2012, respondent and petitioner were in a relationship and living together. They continued living together until approximately April 2017.

¶ 3 On 17 April 2017, petitioner sent respondent a message concerning child support, to which respondent replied:

> Well we will have to go to court first. But it's okay I'm gone to make this money as fast as I can then just quit like I always do. An you won't know were I am. I see you're just like [respondent's children's other mothers]. I'm never giving you my number at all. Goodbye. I'm done Snapchat with you ok I see you never loved me at all have fun o wait your so stress no break from the girls. Me I'm doing good getting to hang with all my guy friends know. Come an go [ ]as I please it's fun[ ].

Despite being physically and mentally able to work and paying child support for two of his other children, respondent has not provided any financial support for Becky since 2017.

¶ 4 Subsequently, on 31 May 2017, petitioner obtained an ex parte domestic violence protective order (DVPO) against respondent. Respondent had no interaction with Becky during the period of time between his moving out of the residence in April 2017 and the entry of the ex parte DVPO. After respondent received notice of the proceeding and a hearing occurred, petitioner secured a DVPO against respondent that was effective from 19 July 2017 to 19 July 2018. Petitioner later married on 17 December 2017.

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1. A pseudonym is used in this opinion to protect the juvenile's identity and for ease of reading.

¶ 5 Approximately two years later, petitioner filed a petition to terminate respondent's parental rights on 7 May 2020. After a hearing, the trial court adjudicated that a ground existed to terminate respondent's parental rights on the basis that he willfully abandoned Becky for the six consecutive months immediately preceding the filing of the termination-of-parental-rights petition, pursuant to N.C.G.S. § 7B-1111(a)(7). In its dispositional order, the trial court found that termination of respondent's parental rights was in Becky's best interests and so terminated respondent's parental rights.

¶ 6 Respondent filed a notice of appeal. However, respondent later filed a petition for writ of certiorari after discovering that the notice of appeal was possibly deficient. This Court allowed the petition for writ of certiorari.

II. Analysis

A. Standard of Review

¶ 7 The North Carolina Juvenile Code sets out a two-step process for termination of parental rights: an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109 to -1110 (2021). At the adjudicatory stage, the trial court takes evidence, finds facts, and adjudicates the existence or nonexistence of the grounds for termination set forth in N.C.G.S. § 7B-1111. N.C.G.S. § 7B-1109(e). If the trial court adjudicates that one or more grounds for termination exist, the trial court then proceeds to the dispositional stage where it determines whether terminating the parent's rights is in the juvenile's best interests. N.C.G.S. § 7B-1110(a).

¶ 8 Appellate courts review a trial court's adjudication that a ground existed to terminate parental rights to determine whether the findings of fact are supported by clear, cogent, and convincing evidence and whether the findings of fact support the conclusions of law. *In re E.H.P.*, 372 N.C. 388, 392 (2019). In doing so, we limit our review to "only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." *In re T.N.H.*, 372 N.C. 403, 407 (2019). "A trial court's finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding." *In re B.O.A.*, 372 N.C. 372, 379 (2019). Further, "[f]indings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. at 407. We review the trial court's conclusions of law de novo. *In re C.B.C.*, 373 N.C. 16, 19 (2019).

B. Adjudication of Willful Abandonment

¶ 9 The trial court adjudicated that the ground of willful abandonment existed to terminate respondent's parental rights to Becky pursuant to N.C.G.S. § 7B-1111(a)(7). In relevant part, N.C.G.S. § 7B-1111(a)(7) provides that the trial court may terminate respondent's parental rights upon finding that he "willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition." N.C.G.S. § 7B-1111(a)(7) (2021). "Wilful [sic] intent is an integral part of abandonment and this is a question of fact to be determined from the evidence." *In re C.B.C.*, 373 N.C. at 19 (alteration in original) (quoting *Pratt v. Bishop*, 257 N.C. 486, 501 (1962)). "Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." *Id.* (quoting *In re Young*, 346 N.C. 244, 251 (1997)). "If a parent withholds that parent's presence, love, care, the opportunity to display filial affection, and willfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *Id.* (cleaned up). "[A]lthough the trial court may consider a parent's conduct outside the six-month window in evaluating a parent's credibility and intentions, the 'determinative' period for adjudicating willful abandonment is the six consecutive months preceding the filing of the petition." *In re K.N.K.*, 374 N.C. 50, 54 (2020) (alteration in original) (quoting *In re N.D.A.*, 373 N.C. 71, 77 (2019)).

¶ 10 Petitioner filed the termination-of-parental-rights petition on 7 May 2020. Therefore, the relevant six-month period ran from 7 November 2019 to 7 May 2020. In support of its conclusion that respondent had willfully abandoned Becky for at least the relevant six-month period, the trial court stated and found as follows:

> 7. That the parties lived together until approximately April of 2017.
>
> 8. That during the course of their relationship, the parties had a minor child, [Becky]. The minor child's date of birth is [in] 2012.
>
> 9. On May 31, 2017, [p]etitioner secured an Ex Parte Domestic Violence Order against [r]espondent. Subsequent to the Ex Parte [order], [p]etitioner secured a Domestic Violence Protective Order against [r]espondent which went into effect July 19th, 2017 and expired July 19th, 2018.

10. That [p]etitioner married her current husband . . . on December 17th, 2017.

11. That grounds exist for the termination of parental rights as it relates to [Becky] under N.C.G.S. [§] 7B-1111(a)(7) where . . . [r]espondent has willfully abandoned the minor child for at least (6) six months immediately preceding the filing of this action, with the relevant (6) six month [ ] period commencing November 7, 2019 and continuing until the filing of the petition on May 7, 2020.

12. That the [trial c]ourt further finds that [r]espondent has exhibited an intent to forego all parental duties or relinquish any parental claim to the minor child, to wit:

A. That [r]espondent has willfully abandoned the minor child since 2017 in that he has shown no interest in assuming responsibility for her care for at least six (6) months prior to the filing of this action;

B. That [r]espondent has willfully abandoned the minor child since 2017 in that he has not been in contact with . . . [p]etitioner or the minor child, nor has he visited, inquired upon, or provided cards, letters, or correspondence to the minor child;

C. That [r]espondent has willfully failed without justification to provide for the care, support, maintenance, and education of the minor child since 2017;

D. That [r]espondent has continued to abandon the minor child by his complete failure to provide the personal contact, love[,] and affection that inheres in the parental relationship since 2017;

13. That on January 12th, 2020, [r]espondent posted pictures of the minor child on his Face[b]ook page, those pictures were taken in April of 2019 by [p]etitioner's husband . . . and were taken from the Face[b]ook page of [p]etitioner's husband evidencing that he had the name of . . .

[p]etitioner's husband but failed to attempt to make contact to see and/or establish a relationship with the minor child. The address of . . . petitioner and her husband was of public record.

14. That on or about April 17th, 2017, [p]etitioner sent a message to [r]espondent concerning child support. Respondent[ ] responded immediately via text as follows: "Well we will have to go to court first. But it's okay I'm gone to make this money as fast as I can then just quit like I always do. An you won't know were I am. I see you're just like [respondent's children's other mothers]. I'm never giving you my number at all. Goodbye. I'm done Snapchat with you ok I see you never loved me at all have fun o wait your so stress no break from the girls. Me I'm doing good getting to hang with all my guy friends know. Come an go [ ]as I please it's fun[."]

15. That as indicated in the April 17, 2017 text message referenced above, [respondent] clearly indicated that he would not provide any financial support to provide for the care of the parties['] minor child; [p]etitioner made [respondent] aware of the need for the child support. [Respondent] willfully refused and failed to provide any support for the minor child. That [respondent] stated in his April 17, 2017 referenced above text that he would quit working to avoid paying child support evidencing his willful disregard for the financial needs of the minor child.

. . . .

19. That since July 18, 2018, the expiration of the Domestic Violence Protective Order and during the six consecutive months prior to the filing of this Termination of Parental Rights Petition, [r]espondent has failed to make contact with [petitioner], has failed to inquire as to the welfare of the minor child or establish a relationship with the minor child in any way, failed to

> send cards or gifts for holidays, birthdays, and any special occasion or milestone in the minor child's life evidencing a willful intent to forego all parental duties and relinquish all parental claims during the six consecutive (6) months prior to the filing of this Termination of Parental [Rights] Petition.

¶ 11 As these findings show, respondent had no contact with Becky after April of 2017, including the relevant six-month period. Respondent does not argue otherwise. Instead, respondent challenges the trial court's findings that respondent's failure to have any contact with Becky during that period was willful, contending that his conduct cannot be willful when respondent had no way to contact or locate Becky. Respondent argues that his access to petitioner's husband's Facebook page or the availability of petitioner's address in the public record would "not necessarily give rise to a conclusion that he had the ability to locate Becky or her mother." Additionally, while conceding that he expressed an unwillingness to pay child support in a text message in 2017, respondent discounts this communication given that it occurred three years prior to the filing of the petition and shortly after the couple broke up.

¶ 12 However, "it is well-established that a [trial] court has the responsibility to pass upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom." *In re A.R.A.*, 373 N.C. 190, 196 (2019) (cleaned up). Thus, the trial court did not err to the extent that it gave considerable weight to the text message from respondent expressing his unwillingness to pay child support. *See id.*; *In re K.N.K.*, 374 N.C. at 54. Further, the trial court had the responsibility to weigh the testimony at the hearing concerning respondent's ability to contact Becky given his access and use of Facebook and the fact that petitioner and her husband's address was in the public record.

¶ 13 At the termination hearing, petitioner testified that both she and her husband have Facebook pages and that she could check respondent's Facebook page and send him messages. Petitioner's Facebook page displayed her maiden name and birthdate, two pieces of identifying information that were known to respondent. Further, when checking respondent's Facebook page, petitioner found that respondent had taken pictures of Becky from petitioner's husband's Facebook page and posted them on his own Facebook page in January of 2020. Accordingly, the trial court could reasonably infer that respondent had access to petitioner's husband's Facebook page on or before this date. While petitioner's

husband's Facebook page may not have contained his address, it was a public Facebook profile under his name and provided a channel through which respondent could have attempted to get into contact with Becky. Respondent, however, never reached out to petitioner's husband through Facebook to get into contact with Becky.

¶ 14 In addition, respondent failed to utilize several other means of contacting Becky that, according to testimony at the hearing, were available to him during the relevant six-month period. For instance, despite knowing petitioner's family and getting along well with them, respondent never reached out to them to try to get in contact with Becky. Nor did respondent file a custody lawsuit. Petitioner and petitioner's husband's address was also available under both of their names through the Brunswick County Register of Deeds since June of 2019. Finally, despite testimony that respondent and petitioner's main means of communication was Snapchat and that respondent contacted petitioner through Snapchat as late as October of 2017, respondent never attempted to get into contact with Becky by reaching out to petitioner through Snapchat.

¶ 15 Therefore, contrary to respondent's contentions, he had various means to contact Becky, but he did not use them. As a result, the trial court's findings that respondent acted willfully—that he had an intent to forego all parental duties and relinquish any parental claim to Becky—during the relevant six-month period were supported by clear, cogent, and convincing evidence. Since the evidence supported the trial court's findings that respondent acted willfully, and the other unchallenged findings supported the trial court's conclusion that a ground existed to terminate respondent's parental rights, we affirm the trial court's orders and need not address respondent's challenges to findings of fact 16 and 17.

III. Conclusion

¶ 16 The trial court did not err when it adjudicated that the ground of willful abandonment existed to terminate respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(7). In addition, respondent does not challenge the trial court's best interests determination. Accordingly, we affirm the orders terminating respondent's parental rights.

AFFIRMED.

IN RE B.R.L.

[381 N.C. 56, 2022-NCSC-49]

IN THE MATTER OF B.R.L.

No. 141A21

Filed 6 May 2022

Termination of Parental Rights—grounds for termination—neglect—inability to parent—likelihood of future neglect

The trial court's order terminating a mother's parental rights on the grounds of neglect was affirmed where the court's finding that she was incapable of parenting her child (who had been adjudicated as neglected) was supported by clear, cogent, and convincing evidence—including testimony from her therapist and her own admission to her social worker—and where the court's determination that there was a likelihood of future neglect was supported by numerous findings—including those related to her inability to care for the child at the time of the hearing and her failure to make progress on her case plan.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) (2019) from an order entered on 18 February 2021 by Judge J.H. Corpening, II, in District Court, New Hanover County. This matter was calendared for argument in the Supreme Court on 18 March 2022 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Jane R. Thompson for petitioner-appellee New Hanover County Department of Social Services.

Battle, Winslow, Scott & Wiley, P.A., by M. Greg Crumpler, for appellee Guardian ad Litem.

Sydney Batch for respondent-appellant mother.

BARRINGER, Justice.

¶ 1 Respondent appeals from an order terminating her parental rights to her minor child B.R.L. (Brian).[1] After careful consideration, we affirm the trial court's order terminating respondent's parental rights.

1. A pseudonym is used in this opinion to protect the juvenile's identity and for ease of reading.

I. Factual and Procedural Background

¶ 2 On 14 August 2018, the New Hanover County Department of Social Services (DSS) filed a petition alleging Brian to be a neglected juvenile. Since January 2018, DSS had been working with Brian's family regarding issues of domestic violence, substance abuse, mental health, stability, parenting, employment, and medical care for Brian. DSS alleged that respondent stabbed Brian's father[2] during a domestic violence altercation, both parents admitted to a history of heroin use and current alcohol use, and respondent was unemployed.

¶ 3 On 28 November 2018, Brian was adjudicated a neglected juvenile. To achieve reunification, the trial court ordered respondent to complete a substance abuse assessment and comply with all recommendations, submit to random drug screens, complete a comprehensive clinical assessment (CCA) and comply with all recommendations, complete a parenting education program and demonstrate learned skills during interactions with Brian, obtain and maintain safe and stable housing, complete the Reproductive Life Planning Education class, and complete a Domestic Violence Offender Program (DVOP).

¶ 4 For the first year of her case, respondent did not participate in her case plan. After a permanency planning hearing on 25 July 2019, the trial court found that respondent had failed to complete any portion of her case plan, failed to maintain contact with DSS and the guardian ad litem, and failed to appear for three requested drug screens. The trial court set the permanent plan as adoption with a concurrent plan of reunification. On 24 September 2019, DSS petitioned to terminate respondent's parental rights to Brian on the grounds of neglect, pursuant to N.C.G.S. § 7B-1111(a)(1), and willfully leaving Brian in foster care for more than twelve months without making reasonable progress under the circumstances in correcting the conditions that led to Brian's removal, pursuant to N.C.G.S. § 7B-1111(a)(2). After the termination-of-parental-rights hearing, the trial court adjudicated that both grounds for termination alleged by DSS existed. The trial court then concluded it was in Brian's best interests that respondent's parental rights be terminated and terminated respondent's parental rights.

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2. Brian's father is not a party to this appeal.

II. Analysis

A. Standard of Review

¶ 5 The North Carolina Juvenile Code sets out a two-step process for termination of parental rights: an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109 to -1110 (2021). At the adjudicatory stage, the trial court takes evidence, finds facts, and adjudicates the existence or nonexistence of the grounds for termination set forth in N.C.G.S. § 7B-1111. N.C.G.S. § 7B-1109(e). If the trial court adjudicates that one or more grounds for termination exist, the trial court then proceeds to the dispositional stage where it determines whether terminating the parent's rights is in the juvenile's best interests. N.C.G.S. § 7B-1110(a).

¶ 6 Appellate courts review the adjudication to determine whether the findings of fact are supported by clear, cogent, and convincing evidence and whether the findings of fact support the conclusions of law. *In re E.H.P.*, 372 N.C. 388, 392 (2019). In doing so, we limit our review to "only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." *In re T.N.H.*, 372 N.C. 403, 407 (2019). "A trial court's finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding." *In re B.O.A.*, 372 N.C. 372, 379 (2019). Further, "[f]indings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. at 407. We review the trial court's conclusions of law de novo. *In re C.B.C.*, 373 N.C. 16, 19 (2019).

B. Adjudication of Neglect

¶ 7 The trial court concluded that grounds existed to terminate respondent's parental rights to Brian for neglect pursuant to N.C.G.S. § 7B-1111(a)(1). The Juvenile Code authorizes the trial court to terminate parental rights if "[t]he parent has abused or neglected the juvenile" as defined in N.C.G.S. § 7B-101. N.C.G.S. § 7B-1111(a)(1) (2021). A neglected juvenile is defined, in pertinent part for this matter, as a juvenile "whose parent . . . [d]oes not provide proper care, supervision, or discipline . . . [or c]reates or allows to be created a living environment that is injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2021).

¶ 8 "[E]vidence of neglect by a parent prior to losing custody of a child—including an adjudication of such neglect—is admissible in subsequent proceedings to terminate parental rights." *In re Ballard*, 311 N.C. 708, 715 (1984). "The trial court must also consider any evidence of changed

conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *Id.* "The determinative factors must be the best interests of the child and the fitness of the parent to care for the child at the time of the termination proceeding." *Id.* (emphasis omitted).

¶ 9 On appeal, respondent does not challenge the trial court's finding of past neglect but does challenge portions of findings of fact 52, 78, and 80 along with the trial court's determination that there was a probability of repetition of neglect. Below, we address only those challenges that are necessary to support the trial court's adjudication that neglect existed as a ground for termination. Since a single ground for termination is sufficient, we need not address respondent's challenges to the other ground adjudicated by the trial court.

¶ 10 Respondent challenges the portion of finding of fact 78 that states she was not capable of parenting Brian as of the date of her testimony at the termination hearing on 21 September 2020. However, this finding was supported by clear, cogent, and convincing evidence. At the termination hearing, respondent's therapist testified that respondent was not capable of parenting as she could only parent for a day or two. Further, the therapist testified that it would take about six months of consistent therapy before respondent would be able to parent Brian, and if respondent fell into her old habits at any point during that time, the entire six-month period would need to restart. Additionally, respondent does not challenge finding of fact 118 that in early September 2020, she herself admitted to her social worker that she was not ready to parent Brian. Thus, finding of fact 78 is supported by clear, cogent, and convincing evidence.

¶ 11 While respondent also challenges the trial court's determination that there was a likelihood of future neglect, that determination was clearly supported by numerous unchallenged findings as well as finding of fact 78. If a respondent cannot parent at the time of the termination hearing, then there is a substantial likelihood of future neglect because the respondent lacks the fitness to care for the juvenile at the time of the termination hearing. *See In re Ballard*, 311 N.C. at 715. Here, respondent was not capable of parenting Brian at the time of the termination-of-parental-rights hearing. Additionally, "[a] parent's failure to make progress in completing a case plan is indicative of a likelihood of future neglect." *In re M.A.*, 374 N.C. 865, 870 (2020) (cleaned up). As discussed below, respondent failed to complete many key aspects of her case plan.

¶ 12 DSS created a case plan to help respondent address the issues that led to Brian entering DSS custody, including domestic violence,

substance abuse, mental health concerns, need for stability, parenting skills, and consistent medical care for Brian. Respondent's case plan included but was not limited to completing a substance abuse assessment and following its recommendations, submitting to random drug screens, completing a CCA and complying with all recommendations, obtaining and maintaining safe and stable housing, completing a parenting education program and demonstrating skills learned from it during interactions with Brian, and completing a DVOP.

¶ 13 However, respondent did not follow the case plan and address the issues that led to Brian's removal. First, respondent never successfully completed a DVOP. Nor did respondent obtain appropriate housing. Respondent also did not address her mental health needs. In addition, while respondent obtained CCAs, she did not fully follow the recommendations she received from them, such as completing a substance abuse intensive outpatient program. Respondent's visitation with Brian was sporadic. Finally, respondent refused to submit to several requested drug screens and repeatedly tested positive for alcohol use despite respondent's alcohol abuse being one of the reasons for Brian's removal. Thus, the trial court found that the concerns that originally brought Brian into DSS's care remained unaddressed. Given these findings, the trial court's determination that there was a likelihood of repetition of neglect was supported. Furthermore, because the findings detailed above are more than sufficient to support the determination that there was a likelihood of repetition of neglect, we need not address respondent's challenges to portions of findings of fact 52 and 80.

III. Conclusion

¶ 14 The trial court did not err when it determined that a ground existed to terminate respondent's parental rights for neglect pursuant to N.C.G.S. § 7B-1111(a)(1). Further, respondent does not challenge the trial court's determination that terminating her parental rights was in Brian's best interests. Accordingly, we affirm the order terminating respondent's parental rights.

AFFIRMED.

IN RE B.R.W.

[381 N.C. 61, 2022-NCSC-50]

IN THE MATTER OF B.R.W., B.G.W.

No. 310A21

Filed 6 May 2022

1. Child Abuse, Dependency, and Neglect—permanency planning—guardianship—constitutionally protected parental status—indefinitely ceding custody to nonparent

The trial court properly awarded guardianship of two neglected children to their paternal grandmother where the court's findings supported its conclusion that their mother had acted inconsistently with her constitutionally protected status as a parent by voluntarily ceding custody of the children—then ages one and four years old—to the grandmother for three years until social services assumed custody. Although the mother made demonstrable progress in her family services plan, the fact that she made minimal contact with the children throughout that three-year period (during which the children developed a stronger bond with the grandmother than with the mother) and made no attempts to regain custody until social services got involved indicated that she intended for the grandmother to serve indefinitely as the children's primary caregiver.

2. Child Abuse, Dependency, and Neglect—guardianship—best interests of the child standard—findings of fact—support for conclusions

The trial court in a neglect case properly applied the "best interests of the child" standard in awarding guardianship of a mother's two children to the paternal grandmother after properly determining that the mother had acted inconsistently with her constitutionally protected parental status. Further, the guardianship award was appropriate where the court's factual findings supported its conclusions that the conditions leading to the children's removal continued to exist (the mother's substantial compliance with her family services agreement did not overcome the initial concerns prompting the children's removal—her relinquishment of custody to the grandmother for three years—and she failed to obtain suitable housing until nineteen months after social services' involvement) and that social services had made reasonable efforts toward reunifying the children with their mother (regardless of social services "abruptly" moving for guardianship after initially recommending a trial home placement).

Justice EARLS dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 278 N.C. App. 382 (2021), affirming, in part, and reversing, in part, a permanency planning order entered on 27 March 2020 by Judge Jeanie Houston in District Court, Yadkin County. Heard in the Supreme Court on 22 March 2022.

James N. Freeman, Jr., for petitioner-appellee Yadkin County Human Services Agency.

Paul W. Freeman, Jr., for appellee Guardian ad Litem.

J. Thomas Diepenbrock for respondent-appellant mother.

ERVIN, Justice.

¶ 1 Respondent-mother Kimberly S. appeals from the decision of a divided panel of the Court of Appeals affirming, in part, and reversing, in part, a permanency planning order awarding legal guardianship of respondent-mother's two minor children, B.R.W. and B.G.W.[1] to Shonnie W., the children's paternal grandmother. After careful consideration of respondent-mother's challenges to the Court of Appeals' decision in light of the record and the applicable law, we affirm the Court of Appeals' decision.

I. Factual Background

A. Substantive Facts

¶ 2 On 1 May 2018, the Yadkin County Human Services Agency received a child protective services report alleging that Brittany and Brianna, ages four and seven, respectively, were neglected juveniles. At that time, Brittany and Brianna were living in a house with their father, Matthew W.; the paternal grandmother; and a paternal great-grandmother. According to the allegations contained in the report, the father "was intoxicated and busting plates and throwing glass in the home." After the paternal grandmother removed the children from the home and contacted law enforcement officers, the father was placed under arrest for drunk and

1. B.R.W. and B.G.W. will be referred to throughout the remainder of this opinion, respectively, as "Brittany" and "Brianna," which are pseudonyms used to protect the children's identities and for ease of reading.

disorderly conduct, resisting a public officer, and violating probation. The father was expected to be incarcerated for the next two years.

¶ 3 On 14 June 2018, HSA filed a petition alleging that Brittany and Brianna were neglected juveniles in that they "live[d] in an environment injurious to [their] welfare." On the same date, Judge William F. Brooks entered an order placing the children in the custody of the paternal grandmother and great-grandmother pending further proceedings. After a hearing held on 25 June 2018, Judge Brooks entered an order on 19 July 2018 finding that respondent-mother was living in Alexander County with her husband, John S., who "has an extensive criminal history including drug-related convictions, assault on a female, larceny, and multiple DWIs" and struggles with alcohol abuse. Judge Brooks further found that, after separating from the father and leaving his home in 2015, respondent-mother had "occasionally visited" with Brittany and Brianna at the father's home and at family gatherings but that she had "not made decisions regarding the minor children's education or welfare, contributed financially to their support and maintenance, or otherwise filled the role of parent/caretaker of the minor children since she and [the father] separated." As a result, Judge Brooks sanctioned the children's continued placement with the paternal grandmother and paternal great-grandmother and authorized both respondent-mother and the father to visit with the children on the condition that they not currently be incarcerated. Judge Brooks also ordered HSA to coordinate with the Alexander County Department of Social Services to conduct a home study of respondent-mother's residence and authorized HSA to place the children in respondent-mother's home if the agency determined the home to be "a suitable and appropriate placement for the minor children."

¶ 4 On 13 July 2018, respondent-mother and the stepfather entered an Out of Home Family Services Agreement with HSA pursuant to which they were required to (1) "[c]omplete a psychological assessment and complete any recommendations made by the assessor," (2) "[p]articipate in a substance abuse assessment and complete any recommendations made by the assessor," (3) "[s]ubmit to random drug screens," (4) "[c]omplete a parenting education program and present [HSA] with a certificate of completion," and (5) "[d]emonstrate stable employment." On 27 July 2018, HSA reported that respondent-mother and the stepfather still lived in Alexander County, had full-time employment, had been attending parenting classes, and had been visiting with the children and that respondent-mother had spoken with the children by phone as well. According to the guardian ad litem, the children "say

they like seeing their [m]om" but also express that they "like living with their grandmothers."

¶ 5 After a hearing held on 2 August 2018, Judge Brooks entered an order on 31 August 2018 adjudicating Brittany and Brianna to be neglected juveniles. According to Judge Brooks, respondent-mother and the stepfather had visited with the children on multiple occasions since entering HSA custody, with "[t]hese visits hav[ing] gone well and [with] their interactions with the children hav[ing] been appropriate." Although Judge Brooks "[took] note of the fact that a significant period of time [had] elapsed since [respondent-mother] [had] been involved in the lives of the minor children on a regular basis," it nevertheless found that she appeared to have "some bond" with her daughters. After keeping the existing placement and visitation orders in effect, Judge Brooks authorized HSA to increase the frequency and duration of respondent-mother's visits with Brittany and Brianna. Finally, Judge Brooks established a primary permanent plan for the children of reunification, with a secondary permanent plan of guardianship.

¶ 6 On 16 August 2018, respondent-mother informed the Alexander County Department of Social Services that her landlord was selling the mobile home in which she and the stepfather had been living, that they were being forced to move, and that she did not know how the required home study could be conducted. On 29 August 2018, the Alexander County Department of Social Services declined to approve the home that respondent-mother and the stepfather occupied in light of their lack of stable housing and the stepfather's extensive criminal history.

¶ 7 After a 90-day review hearing held on 25 October 2018, Judge Robert J. Crumpton entered an order on 6 December 2018 finding that respondent-mother had made significant progress in satisfying the requirements of her family services agreement in light of the fact that she had secured temporary housing in Wilkes County, maintained stable employment, had access to reliable transportation, visited with the children regularly, remained in contact with HSA, submitted to random drug screenings, and completed a psychological assessment. On the other hand, Judge Crumpton found that respondent-mother had failed to complete a substance abuse assessment or a parenting education program. In addition, Judge Crumpton found that the stepfather had also been visiting with the children regularly, had remained in contact with HSA, and had submitted to random drug screenings; that he was unemployed "due to a back injury"; and that he had not completed either a substance abuse assessment or a parenting education program. After noting that respondent-mother and the stepfather "have consistently attended

visitation with the minor children" and "appear to be bonded with the children," so that HSA had exercised its authority to increase the amount of visitation to which respondent-mother and the stepfather were entitled, Judge Crumpton retained the existing visitation arrangement while authorizing HSA to increase the frequency and duration of the visits between respondent-mother, the stepfather, and the children and to allow unsupervised visitation. Finally, Judge Crumpton determined that the primary permanent plan for the children should remain reunification, with the secondary permanent plan being one of guardianship.

¶ 8 On 14 May 2019, HSA submitted a revised court report noting that respondent-mother had been "working diligently on her" family services agreement, that she had participated in parenting classes, and that she had an "agree[ment] to increase the hours she works so that her income can increase in order to best meet the needs of her child[ren]." Similarly, HSA reported that the stepfather had "made substantial progress" in satisfying the requirements of his own family services agreement despite the fact that he did not have a regular income. HSA noted that respondent-mother and the stepfather had been participating in unsupervised visitation with the children on Saturday afternoons, that they took the children to church on the last Sunday of each month, and that respondent-mother was in compliance with her obligation to make court-ordered child support payments, having even made payments against an existing arrearage. After acknowledging the progress that both parents had made in satisfying the requirements of their family service agreements, HSA observed that "[p]arenting classes need to be completed and the home is not yet ready to house the children." As a result, HSA recommended that Brittany and Brianna remain in their current placement with the paternal grandmother and paternal great-grandmother and that it be authorized, in the exercise of its discretion, to allow overnight visitation between the children, on the one hand, and respondent-mother and the stepfather, on the other.

¶ 9 On 3 May 2019, the guardian ad litem submitted a report indicating that, while she "would like to support and encourage [respondent-mother's] relationship with" Brittany and Brianna, she had "serious concerns" relating to the stepfather. More specifically, the guardian ad litem stated that she had witnessed the stepfather "become increasingly angry with [HSA] social workers" at a Child and Family Team meeting, held on 26 April 2019, before "storming out mad and ordering [respondent-mother] [to] come with him." In light of this experience, the guardian ad litem stated that she was "extremely concerned about the safety of the girls, as well as [respondent-mother,]" and expressed

the opinion that the "primary" motivation underlying the attempts that respondent-mother and the stepfather had been making to obtain custody of the children was gaining access to thousands of dollars in custody-related tax benefits. The guardian ad litem explained that, according to the paternal grandmother, respondent-mother had told the paternal grandmother upon leaving the children with her in 2015 that "she would take the girls if [the father] and [the paternal grandmother] didn't allow [respondent-mother] and stepfather to claim the girls for [a] tax refund even though [the girls] did not live with them," with such an arrangement having continued to exist for three years prior to the beginning of HSA's involvement with the children. As a result, the guardian ad litem recommended that the stepfather be required to obtain a domestic violence and anger-related assessment and that respondent-mother be required to obtain an assessment for possible effects of domestic violence.

¶ 10 After a hearing held on 16 May 2019, Judge David V. Byrd entered a permanency planning order on 16 July 2019 in which he found that the Wilkes County residence occupied by respondent-mother and the stepfather was "safe and appropriate for the minor children" and that respondent-mother and the stepfather were "active participant[s]" in parenting classes and had been "implementing the lessons [that they] [were] learning during [their] interactions with the minor children." Judge Byrd endorsed the children's continued placement with the paternal grandmother and paternal great-grandmother and retained the existing visitation plan, subject to the understanding that HSA had the authority to authorize additional overnight visitation. In addition, Judge Byrd ordered respondent-mother and the stepfather to obtain domestic violence assessments and determined that the primary permanent plan for the children should remain one of reunification, with the secondary permanent plan for the children being one of guardianship.

¶ 11 On 13 July 2019, Brittany and Brianna began overnight visits with respondent-mother and the stepfather at their residence in Wilkes County. On 23 August 2019, the counselor who performed the anger and domestic violence assessments for respondent-mother and the stepfather reported that, "after a very extensive domestic violence evaluation of both individuals and an anger management assessment of the [stepfather] plus having interviewed the couple separately and together, there is no indication of any domestic violence or anger issues." On 29 August 2019, Judge Brooks entered an order continuing the case until 26 September 2019 for the purpose of "allow[ing] [respondent-mother] to have stable housing" subject to the understanding that there would be no further continuances.

¶ 12 On 12 September 2019, HSA submitted a report stating that respondent-mother had "completed all objectives" set out in her family services agreement and recommended the commencement of a trial home placement. On the other hand, a revised report submitted by the guardian ad litem on 17 September 2019 indicated that, despite the fact that respondent-mother was working and had access to reliable transportation, the residence that she occupied with the stepfather was "not appropriate for full time care of the girls." According to the guardian ad litem, respondent-mother and the children slept in one bedroom, the stepfather's mother slept in the second bedroom, the stepfather slept in a recliner in the living room, and the stepfather's uncle slept on the couch. The guardian ad litem reported that, while respondent-mother and the stepfather had "said they are looking for a home for themselves and the girls," they had "made no progress in a year," and that, even though respondent-mother had stated that she "[didn't] want to take [Brittany] out of the Jonesville [Yadkin County] school district 'because she loves it so much,' " there was "no evidence" that respondent-mother and the stepfather had sought to obtain housing in Jonesville.

¶ 13 In addition, the guardian ad litem stated that (1), according to Brianna, the two children had ridden in the back of respondent-mother's pickup truck, an allegation that respondent-mother subsequently confirmed; (2), on 6 September 2019, a Friday, respondent-mother had been late in picking up Brianna from school and that, when Brianna complained of a headache and did not go to school on the following Monday, respondent-mother dropped Brianna off with the paternal grandmother instead of staying with Brianna, an action that caused the paternal grandmother to miss a day of work; (3), on the same date, Brittany's teacher reported that the child "would not sit down at her desk to work and also wouldn't talk," which was "unusual behavior for her;" (4), on 13 September 2019, when the school lost power and could not reach respondent-mother to pick up the children, the paternal grandmother had been required to do so; and (5), on 18 September 2019, Brianna told the guardian ad litem that the stepfather had stated that, "from now on[,] he would be sleeping in the bed with [respondent-mother] rather than on the recliner and [that] [Brittany and Brianna] could sleep at the bottom of the bed[.]" In light of this information, the guardian ad litem concluded that respondent-mother was continuing a "lifelong pattern of pushing responsibility for the children off on the [paternal] grandmother," with "multiple sources" having informed the guardian ad litem that, "throughout these little girls' lives[,] [respondent-mother] has left them in [the] care of [the] paternal grandmother for long stretches of time, only visiting sporadically when convenient for her," while

simultaneously "collect[ing] tax refunds of at least $7,000 each year for at least three years prior to [the upcoming permanency planning hearing] despite not providing primary care." According to the guardian ad litem, it was "very unlikely that either parent can be responsible for the girls without support from their own parents," with it being "in the best interest of the children that someone more dependable ha[ve] legal custody, while still allowing them to have a relationship with their parents." As a result, the guardian ad litem recommended awarding custody or guardianship to the paternal grandmother.

¶ 14 After a hearing held on 26 September 2019, Judge Brooks entered a consent permanency planning order on 6 November 2019 finding that, while respondent-mother had complied with most of the requirements of her family services agreement, the two-bedroom residence in which respondent-mother lived with the stepfather was "currently occupied by no less than four adults and lacks sufficient space for the minor children to return to on a permanent basis under these circumstances." Similarly, Judge Brooks found that the stepfather had complied with the requirements of his family services agreement with the exception of its housing-related provisions and his continued unemployment "due to a back injury," and that both respondent-mother and the stepfather had obtained domestic violence assessments. As a result, Judge Brooks concluded that, "in light of [respondent mother's] and [the stepfather's] near-completion of their [family services agreements], it is likely that the minor children can be returned home within the next six months." Judge Brooks continued the existing visitation arrangements and retained the existing primary and secondary permanent plans for the children.

¶ 15 On 21 November 2019, HSA filed a motion for review and requested a new permanency planning hearing for the purpose of "finalizing and obtaining permanency for" Brittany and Brianna in which it indicated that it would request that the paternal grandmother be made the children's guardian. On 17 December 2019, HSA submitted a report to the trial court in which it detailed the reasons that it believed that the implementation of its revised proposed permanent plan would be appropriate. According to HSA, Brianna, who was then in third grade,

> has displayed some attachment and adjustment issues after weekend visitation with her mother. [Brianna] is having transition issues on Mondays at school once she had spent the weekend with [respondent-mother]. The school guidance counsel[lor], the princip[al] and [Brianna's] therapist Amber Dillard have reported issues with school transitions on

> Monday[s] and lasting all day. [Brianna] cr[ies] and ask[s] for her grandmother and is sad until time to be picked up. When [Brianna] is ask[ed] what is wrong she states that she misses her grandmother and wants to be with her. [Brianna] has stated to [HSA] at the last couple of home visits, and at a permanency planning meeting, that she want[s] to live with her grandmother and visit with her mother.

Similarly, HSA reported that Brittany "has displayed some attachment and adjustment issues after weekend visitation with her mother" and that, even though Brittany was seeing Ms. Dillard for therapy, she "does not talk a lot." As a result of "the continued statements and reports from other professionals, that [Brianna] has made in regards to [wanting] to remain in her grandmother['s] home[,] [HSA] request[ed] that Guardianship of both girls be granted to [the paternal grandmother] on this date and that the agency be released of any further efforts."

¶ 16 On 20 December 2019, the guardian ad litem submitted an additional report indicating that both Brittany and Brianna "are having very concerning emotional problems that seem to be tied to their weekend visits with their mother and stepfather," with Brianna's teacher reporting that Brianna "is often so distraught on [Mondays] that she cannot focus on classwork and often breaks into tears" and with Brittany's teacher having noticed that, after these weekend visits, Brittany "would not sit down at her desk to work and also wouldn't talk," which was "unusual behavior for her." The guardian ad litem stated that, when she questioned Brianna about her behavior, Brianna said that "she likes seeing her mother but misses her grandmother." The guardian ad litem further reported that both girls expressed a desire to live with the paternal grandmother and great-grandmother, although they wanted to continue seeing respondent-mother and the father as well. However, Brianna told the guardian ad litem that respondent-mother "pays more attention to [the stepfather] than to us" and "sometimes doesn't even talk to [us]." As a result, the guardian ad litem concluded that it was not possible for the children to be returned to respondent-mother "within a reasonable period of time" given that

> [t]he children have been in [HSA] custody for over a year now and overnight visits only began in July with [respondent-mother]. After these visits, the girls exhibit extreme emotional distress. On at least two occasions—involving the girls riding in the back of the pickup truck, and involving the [stepfather] sleeping

> on the couch rather than the bedroom—[respondent-mother] was less than forthcoming about what was happening in her home and only discussed it after one of the children told [the guardian ad litem]. Because of this, [the guardian ad litem] has concerns about [respondent-mother] putting the girls' best interest above her husband's.
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> . . . .
>
> In addition, the girls' primary care bond is to their grandmother, who has essentially raised them their entire lives. Even when their mother and father were married, they lived with their grandmother. When [respondent-mother] left 3-4 years ago, she only visited sporadically, and often only for an afternoon.
>
> It is in the best interest of the children that they remain in their current home, where they are most secure—their grandmother's.

As a result, the guardian ad litem recommended that the court award guardianship of the children to the paternal grandmother.

¶ 17 In anticipation of the new permanency planning hearing requested in its motion for review, HSA submitted a new report in which it expressed many of the same concerns outlined in the report submitted by the guardian ad litem. In recommending that the paternal grandmother be made the children's guardian, HSA noted that it

> recognizes that [respondent-mother] has completed all requirements of her [family services agreement]. However, while the children do have a bond with [respondent-mother], their bond and connection is primarily with their [paternal] grandmother. Both [Brittany] and [Brianna] primarily have always resided with their [paternal] grandmother who has provided the most stability and consistency regarding their care and supervision. [Respondent-mother] was absent from the children's lives for approximately three years (prior to the children coming into foster care) and during this time the children were cared for by their paternal grandmother.
>
> The children have continued to make statements to their social worker, [the guardian ad litem], and

> other professionals that they wish to reside with their [paternal] grandmother but have visits with their parents. [HSA] is requesting that Guardianship of both girls be granted to [the paternal grandmother] on this date and that the agency be released of any further efforts.

On the other hand, HSA recommended respondent-mother continue to have weekend visits with the children.

¶ 18 On 30 January 2020, the trial court held a permanency planning review hearing. At that hearing, the paternal grandmother testified that she had been with Brittany and Brianna since they were born and described the children as "my life." The paternal grandmother testified that, after leaving the children with her in 2015, respondent-mother only visited the children on holidays and birthdays and failed to provide any child support despite the fact that respondent-mother and the paternal grandmother resided in the same county and the fact that respondent-mother had continued to claim the children as dependents for tax purposes until they entered HSA custody.

¶ 19 Respondent-mother testified that she and the stepfather had recently moved into a three-bedroom, two-bathroom house in Surry County and that she had full-time employment. Respondent-mother explained that she left the children with the paternal grandmother because the father, who had recently been released from prison, had resumed drug and alcohol use and because she had "been abused." Respondent-mother claimed that she had "seen the girls a lot more than what was said" and that, on certain occasions when she was scheduled to visit with the children, the paternal grandmother would take the children and leave the house. Similarly, respondent-mother claimed that, in the years before she began making court-ordered child support payments, she had given the paternal grandmother between $2,000 and $3,000 in financial assistance and denied that she had claimed the children as dependents for tax purposes. Respondent-mother asserted that she had completed the requirements set out in her family services agreement and that she had been visiting with the girls on weekends for approximately five months. Respondent-mother testified that she had a "great" bond with her daughters, that they "have a really good time" together, and that both Brittany and Brianna were comfortable with both her and the stepfather. In conclusion, respondent-mother emphasized that she had "been there" for her daughters and that "[t]hey're my girls and I love them."

¶ 20 Steven Corn, a social worker employed by HSA, testified that one of the reasons that the agency had decided to change its recommendation

relating to the children's primary permanent plan from reunification to guardianship was Brianna's statements to HSA staff and other professionals that, while "she has a bond with her mother," "she feels more secure with her grandmother and wants to live with her grandmother and continue just to have visitation with her mother." In addition, Mr. Corn stated that Ms. Dillard, who served as the children's therapist, had expressed concern that "on Monday mornings transitions [were] very hard" for the girls and that, even though sometimes "Monday afternoons seemed to be better," on other occasions, "those transition episodes would last into maybe Tuesday also."

¶ 21 At the conclusion of the hearing, the trial court announced its intention to award guardianship of the children to the paternal grandmother and to allow respondent-mother to visit with the children every other weekend from Friday through Sunday in attempt to alleviate some of the transition-related problems that the girls were experiencing at school on Monday mornings. On 27 March 2020, the trial court entered a written permanency planning review order in which it found the following pertinent facts, among others, "by clear, cogent and convincing evidence:"

> 24. The Court finds requiring the children to live with [respondent-mother] and [the stepfather] is not in their best interest and is contrary to their health, safety and welfare. Therefore it is not possible for the children to be reunified to [respondent-mother's] home immediately or within the next six months.
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> . . . .
>
> 30. At this time reunification efforts clearly would be unsuccessful and/or would be inconsistent with [Brittany] and [Brianna]'s health or safety and need for a safe, permanent home within a reasonable period of time.
>
> . . . .
>
> 34. The Court finds [respondent-mother] and [Father] by clear and convincing evidence are unfit to provide for [Brittany] and [Brianna]'s needs and have acted in a manner inconsistent with their constitutionally protected status as a parent. [Brittany] and [Brianna] have been in non-secure custody for 19 months. Respondent-mother] has completed her [family services agreement] but the children have, since birth,

> resided in the home of [the paternal grandmother] and wish to remain there. [Respondent-mother] has not resided with the girls for now five years. [Father] is incarcerated again and has not completed a family services agreement.

As a result, the trial court concluded that placement of the children with either respondent-mother or the father would be "contrary to their health, safety, welfare and best interest" because the "[c]onditions that led to the custody of the children by [HSA] and removal from the home of the parent(s) continue(s) to exist." Finally, the trial court concluded that "the best interest of the minor children, [Brittany] and [Brianna], would be served by awarding guardianship to [the paternal grandmother]" while making it clear that either party had the right to file a motion for review at any time. Respondent-mother noted an appeal to the Court of Appeals from the trial court's order.

B. Court of Appeals Decision

¶ 22 In seeking relief from the trial court's order before the Court of Appeals, respondent-mother argued that the trial court had erred by awarding guardianship of the children to the paternal grandmother on the grounds that its determination that respondent mother was "unfit" and had "acted in a manner [inconsistent with] her constitutionally protected status as a parent" was "not supported by clear and convincing evidence, and [was] inconsistent with other findings of fact in the order." In addition, respondent-mother contended that the trial court had erred "when it applied a best interest standard in making its guardianship decision" because that standard "is not applicable to an order granting custody or guardianship to a non-parent until after the court has properly found that the parent was unfit or has acted inconsistently with [her] constitutionally-protected rights." Finally, respondent-mother argued that the trial court's conclusion that placing the children in her home would be "contrary to their health, safety, welfare and best interest" was not supported by adequate findings of fact.

¶ 23 In evaluating the validity of respondent-mother's challenges to the trial court's order, the majority at the Court of Appeals began by observing that, in its findings of fact, the trial court had "treat[ed] unfitness and acting inconsistently with constitutionally protected rights as a single determination" despite the fact that they are "are two separate determinations" that "must be reviewed independently." *In re B.R.W. & B.G.W.*, 278 N.C. App. 382, 2021-NCCOA-343, ¶ 32 (citing *Peterson v. Rogers*, 337 N.C. 397, 403–404 (1994)). After acknowledging that "[p]rior cases have

often not been clear on whether the determination of unfitness or acting inconsistently with a constitutionally protected right is a conclusion of law or a finding of fact," the Court of Appeals concluded that the issues of fitness and conduct inconsistent with one's parental rights were conclusions of law subject to de novo review. *Id.* ¶ 34 (citing *In re V.M.*, 273 N.C. App. 294, 298 (2020); *Raynor v. Odom*, 124 N.C. App. 724, 731 (1996); *Boseman v. Jarrell*, 364 N.C. 537, 549 (2010)).

¶ 24 In examining whether respondent-mother had acted inconsistently with her constitutionally protected status as the children's parent, the Court of Appeals noted that, "[e]ven where there is no question of a parent's fitness, a parent may act inconsistently with her parental rights by voluntarily ceding her parental rights to a third party," such as "where a parent voluntarily allows her children to reside with a nonparent and allows the nonparent to support the children and make decisions regarding the children's care and education[.]" *Id.* ¶ 42 (citing *Owenby v. Young*, 357 N.C. 142, 146 (2003); *In re Gibbons*, 247 N.C. 273, 280 (1957)). In making this determination, the majority at the Court of Appeals held that "[t]he trial court [had] properly considered [respondent-mother's] absence from the home and her lack of involvement with the children for three years prior to [the father's] arrest to support its conclusion that [respondent-mother] had acted inconsistently with her constitutionally protected rights." *Id.* ¶ 45. In the majority's view, "[respondent-mother] chose to forgo her constitutionally protected rights when she left her daughters in the care of [the paternal grandmother] for an indefinite period of time with no express or implied intention that the arrangement was temporary," *id.* ¶ 46 (citing *Boseman*, 364 N.C. at 552; *Price v. Howard*, 346 N.C. 68, 83 (1997)), and that the trial court's decision was "supported by the findings of fact, considering the totality of the circumstances," *id.* ¶ 46 (citing *Adams v. Tessener*, 354 N.C. 57, 66 (2001)).

¶ 25 In addressing the issue of whether respondent-mother was unfit to parent the children, the Court of Appeals observed that "[m]any of the findings of fact regarding [respondent-mother] addressed her compliance with most of the requirements of [her family services agreement]," including the fact that she had completed parenting classes; obtained assessments for domestic violence and anger management, neither of which resulted in recommendations for additional services; submitted to random drug screenings, all of which had been negative; engaged in unsupervised visitation with the children, including overnight and weekend visitation; and secured stable housing that was appropriate for children. *Id.* ¶ 48. As a result, the majority at the Court of Appeals held that "the trial court's findings of fact did not support a conclusion

that [respondent-mother] is unfit" and reversed the trial court's order with respect to this issue. *Id.* Nevertheless, the Court of Appeals majority determined that, "because the trial court's determination that [respondent-mother] acted in a manner inconsistent with her constitutionally protected status was supported by the findings of fact, the trial court did not err in its grant of guardianship to [the paternal grandmother]." *Id.* (citing *Bennett v. Hawks*, 170 N.C. App. 426, 429 (2005)). Accordingly, the majority held that the trial court did not err in determining that the "best interests of the child" supported an award of guardianship of the children to the paternal grandmother. *Id.* ¶ 49.

¶ 26 Finally, the Court of Appeals considered respondent-mother's contention that several of the trial court's conclusions of law were not supported by its findings of fact or else rested on a misapplication of the law. After noting that, to the extent that respondent-mother's arguments to this effect rested on a belief that the trial court had erred by concluding that she had acted inconsistently with her constitutionally protected status as the children's parent, any such argument would lack merit, the majority of the Court of Appeals held that the challenged conclusions of law had ample support in the trial court's findings of fact. *Id.* ¶ 50. In reaching this conclusion, the Court of Appeals noted that the fact that respondent-mother had made significant progress in satisfying the requirements of her family services agreement "does not automatically lead to a conclusion that the conditions which led to [the] removal [of Brittany and Brianna from her custody] do not continue to exist" and that, while it was true that, "by the time of the permanency planning hearing, [respondent-mother's] circumstances had changed in many ways," the trial court's conclusions were nevertheless supported by adequate findings of fact. *Id.* ¶¶ 52–53. In addition, the Court of Appeals rejected respondent-mother's contention that the trial court had erred by making an "abrupt" change to the permanent plan for the children despite the nature and extent of her success in satisfying the requirements of her family services agreement, reasoning that "[respondent-mother] cites no authority regarding the timing or 'abruptness' of a change in the plan to achieve permanence" and, "as long as the trial court considers the factors as required by [N.C.G.S.] § 7B-901(c) and makes appropriate findings, we can find no abuse of discretion by the trial court's decision to change to guardianship." *Id.* ¶ 55.

¶ 27 Although Judge Carpenter expressed agreement with his colleagues' determination that the trial court's findings of fact had sufficient evidentiary support, he declined to join their determination that those findings supported certain of the trial court's conclusions of law. *Id.* ¶ 59

(Carpenter, J., concurring, in part, and dissenting, in part). More specifically, Judge Carpenter would have held that the trial court's findings of fact did not suffice to support the trial court's conclusions that "[p]lacement of the children, [Brittany] and [Brianna], to the mother or father's home at this time is contrary to their health safety, welfare, and best interests" and that the "[c]onditions that led to the custody of the children by [HSA] and removal from the home of the parent[s] continue(s) to exist." *Id.* Judge Carpenter noted that, even though the majority had relied upon respondent-mother's delay in obtaining suitable housing in support of its determination that respondent-mother had acted inconsistently with her constitutionally protected right to parent, the trial court had failed to make any findings of fact with respect to this issue and had, on the contrary, found that respondent-mother "has participated with the service plan and has made adequate progress within a reasonable period of time." *Id.* ¶ 62. In addition, Judge Carpenter pointed out that "adequate housing for the children was ultimately obtained before the 30 January 2020 permanency planning hearing." *Id.* According to Judge Carpenter, "if [respondent-mother] had completed her family services agreement and was presumably in compliance with [that] agreement, including housing requirements, then the conditions that led to children's removal from their parents' home would surely have been eliminated in [respondent-mother's] home." *Id.* ¶ 65. As a result, Judge Carpenter would have held that the trial court's findings did not suffice to support its conclusion that respondent-mother had "act[ed] in a manner inconsistent with the health or safety of" her children, so that the trial court had erred by authorizing the cessation of efforts to reunify respondent-mother with the children. *Id.* (quoting N.C.G.S. § 7B-906.2(3)(4) (2019)).

¶ 28 In addition, Judge Carpenter disagreed with the majority's determination that respondent-mother had forfeited her constitutionally protected right to parent her children when she left Brittany and Brianna in the paternal grandmother's care for an extended and indefinite period of time. *Id.* ¶ 66. After acknowledging that "the record reveals that [respondent-mother] did indeed leave the father's home in 2015 while the minor children remained in the [paternal] grandmother's and father's care," Judge Carpenter pointed out that respondent-mother had "signed and completed [a family services agreement] on 13 July 2018, with which she made reasonable progress throughout the course of the plan;" that various trial judges had maintained reunification as the primary plan until the most recent hearing; and that the trial court had "failed to make findings of fact that reunification would be inconsistent with the children's health and safety." *Id.* ¶¶ 68–70. In Judge Carpenter's

view, a decision "[t]o ignore compliance with a case plan would serve to discourage parents who, like [respondent-mother], comply with [social services] requirements and recommendations and seek reunification with their children" and would be "detrimental to the success of the [HSA] program and similar programs." *Id.* at ¶ 70.

II. Substantive Legal Analysis

A. Standard of Review

¶ 29 According to well-established North Carolina law, appellate review of a permanency planning order "is limited to whether there is competent evidence in the record to support the findings of fact and whether the findings support the conclusion of law," *In re L.M.T.*, 367 N.C. 165, 168 (2013) (cleaned up), with the trial court's findings of fact being "conclusive on appeal if supported by any competent evidence," *id.*; *see also Owenby*, 357 N.C. at 147 (noting that "the trial court's findings of fact are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary"). A trial court's determination that a parent has acted inconsistently with his or her constitutionally protected status as the parent is subject to de novo review, *Boseman*, 364 N.C. at 549, and "must be supported by clear and convincing evidence," *Adams*, 354 N.C. at 63.

B. Acting in a Manner Inconsistent with Constitutionally Protected Status

¶ 30 **[1]** The Due Process Clause of the Fourteenth Amendment to the United States Constitution protects "a natural parent's paramount constitutional right to custody and control of his or her children" and ensures that "the government may take a child away from his or her natural parent only upon a showing that the parent is unfit to have custody" or "where the parent's conduct is inconsistent with his or her constitutionally protected status." *Adams*, 354 N.C. at 62 (citing *Troxel v. Granville*, 530 U.S. 57, 72–73 (2000)). In view of the fact that no party has challenged the validity of the Court of Appeals' determination that the trial court's factual findings had sufficient record support and that the trial court's findings did not support a determination that respondent-mother was an unfit parent before this Court, the principal issue that we must decide in this case is whether the trial court's findings of fact support its determination that respondent-mother had acted in a manner that was "inconsistent with [her] constitutionally protected status." *Id.*

¶ 31 In seeking to persuade us that this question should be answered in the negative, respondent-mother directs our attention to the trial court's

factual findings concerning the nature and extent of her compliance with her family services agreement, in which the trial court stated that:

> 3. [Respondent-mother] entered an Out of Home Family Services Agreement on July 13, 2018. The mother is employed . . . and has no known mental health or substance abuse issues. She resides with her husband, [the stepfather], who also entered a Family Services Agreement on July 13, 2018. [The stepfather] has applied for social security disability benefits and is not employed at this time.
>
> 4. [Respondent-mother] and her husband have completed parenting classes and a Domestic Violence and Anger Management Assessment. The assessment had no recommendations for further services.
>
> 5. [Respondent-mother] has submitted to random drug screens; all have been negative for substances.
>
> 6. [Respondent-mother] and [the stepfather] have had unsupervised visitation including overnight and weekend visitation (every Friday – Monday morning). They have moved to a home that allows the children to have a bedroom.
>
> 7. [Respondent-mother] has participated with the service plan and has made adequate progress within a reasonable period of time. She has generally attended court hearings and has stayed in contact with [HSA] and the [Guardian ad Litem] Program.

In respondent-mother's view, "[t]here can be little doubt that these findings describing [her] compliance with her case plan do not support the conclusion that she acted in a manner inconsistent with her constitutionally protected status." Respondent-mother places considerable emphasis on the fact that the trial court had authorized her to have unsupervised overnight visitation with Brittany and Brianna given the fact that the entry of such an order must follow "a hearing at which the court finds the juvenile will receive proper care and supervision in a safe home," citing N.C.G.S. § 7B-903.1(c) (providing, in pertinent part, that, "[i]f a juvenile is removed from the home and placed in the custody or placement responsibility of a county department of social services, the director shall not allow unsupervised visitation with or return physical custody of the juvenile to the parent, guardian, custodian, or

caretaker without a hearing at which the court finds that the juvenile will receive proper care and supervision in a safe home").

¶ 32 After acknowledging the Court of Appeals' determination, in reliance upon *Boseman*, that "[her] actions related to leaving the home in 2015, allowing [the] paternal grandmother to care for her children and living separately from the children for three years constitutes actions inconsistent with her constitutionally-protected status," respondent-mother argues that "the facts of [*Boseman*] bear little resemblance to those [at issue] here." In *Boseman*, two women who had cohabited as domestic partners decided to have a child using a process pursuant to which the defendant became impregnated by means of artificial insemination and then allowed the plaintiff to adopt the child. *Boseman*, 364 N.C. at 539–40. After the couple separated and the plaintiff sought custody of the minor child, this Court concluded that, by bringing the plaintiff into the "family unit" and holding her out as the child's parent, the defendant had "acted inconsistently with her paramount parental status." *Id.* at 550–51. More specifically, this Court observed that

> [t]he record in the case *sub judice* indicates that defendant intentionally and voluntarily created a family unit in which plaintiff was intended to act—and acted—as a parent. The parties jointly decided to bring a child into their relationship, worked together to conceive a child, chose the child's first name together, and gave the child a last name that "is a hyphenated name composed of both parties' last names." The parties also publicly held themselves out as the child's parents at a baptismal ceremony and to their respective families. The record also contains ample evidence that defendant allowed the plaintiff and the minor child to develop a parental relationship. . . . Moreover, the record indicates that defendant created no expectation that this family unit was only temporary.

Id. at 552.

¶ 33 Respondent-mother argues that in this case, unlike the defendant in *Boseman*, she "did not intentionally create a family unit including [the paternal grandmother], did not jointly name the children with [the paternal grandmother], and did not hold out [the paternal grandmother] to be a parent of the children." In addition, respondent-mother contends that, "after HSA became involved with her daughters, [she]

fully pursued reunification, substantially completed her [family services agreement], and had been awarded unsupervised overnight visitation every weekend."

¶ 34 In a similar vein, respondent-mother attempts to distinguish this case from *Price* on factual grounds. In *Price*, after giving birth to a daughter, the defendant mother gave her daughter the plaintiff's last name on the child's birth certificate but did not name the plaintiff as the child's father on that document. *Price*, 346 N.C. at 70–71. In addition, "from the time of the child's birth, [the] defendant represented that [the] plaintiff was the child's natural father." At the time that the couple separated and the defendant moved to Eden, the child remained in the primary physical custody of the plaintiff and attended her first year of school in Durham, where the plaintiff resided. *Id.* at 71. In a subsequent custody dispute during which a blood test demonstrated that the plaintiff was not the child's biological father, the trial judge determined that the best interests of the child would be served by awarding primary custody of the child to the plaintiff even though both parties were deemed "fit and proper persons to exercise the exclusive care and custody of the child." *Id.* at 71. On appeal, this Court held that, while "[u]nfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy," "[o]ther types of conduct, which must be viewed on a case-by-case basis, can also rise to this level so as to be inconsistent with the protected status of parents." *Id.* at 79. In light of this fact, we concluded that

> [i]t is clear from the record that [the] defendant created the existing family unit that includes [the] plaintiff and the child, but not herself. Knowing that the child was her natural child, but not [the] plaintiff's she represented to the child and to others that [the] plaintiff was the child's natural father. She chose to rear the child in a family unit with the plaintiff being the child's de facto father. The testimony at trial shows that the parties disputed whether [the] defendant's voluntary relinquishment of custody to [the] plaintiff was intended to be temporary or indefinite and whether she informed [the] plaintiff and the child that the relinquishment of custody was temporary.

Id. at 83. As a result of the trial court's failure to make findings of fact addressing the length of time over which the defendant intended to relinquish custody of the child, we remanded this case to the trial court for a determination concerning whether the plaintiff and the defendant

had reached any agreement about the length and scope of the custodial arrangement. *Id.* at 84.

¶ 35 According to respondent-mother, the facts at issue in *Price* "are completely distinct from those of this case" because "[t]his case does not involve a situation where [she] represented to the children and others that [the paternal grandmother], and not she, was the girls' parent." Instead, respondent-mother argues that she simply allowed the children to live with and be cared for by the paternal grandmother, continued to visit her children, and fully pursued reunification once HSA got involved. Respondent-mother concludes that, "[b]ecause the trial court's finding that [she] is unfit to provide for her daughter[s'] needs and has acted in a manner inconsistent with her constitutionally protected status as a parent is not supported by the findings of fact, the trial court erred when it applied a best interest standard" in determining that the paternal grandmother should be made the children's guardian.

¶ 36 In response, HSA argues that the Court of Appeals correctly determined that the trial court's conclusions of law were supported by its factual findings. More specifically, HSA points out that "one of the conditions that led to Brianna and Brittany's placement into [HSA] custody was [respondent-mother's] lack of contact and involvement in the [girls'] lives for three years prior to [HSA] involvement and inappropriate housing." HSA contends that, even though respondent-mother "was never denied visitation or extended visits with the children" during the three years after she left the father's home, "she only exercised visitation on holidays and birthdays" and "provided no support to the paternal grandmother [while] continu[ing] to claim the children as dependents on her taxes," resulting in a situation in which the paternal grandmother "provided all financial support and made all parental decisions for Brittany and Brianna essentially from their birth forward." Arguing in reliance upon *Price*, HSA asserts that "a period of 'voluntary nonparent custody' may provide sufficient evidence of conduct inconsistent with the parent's constitutionally protected status, such that the best interest standard for custody determination is then employed." In addition, arguing in reliance upon *Speagle v. Seitz*, 354 N.C. 525 (2001), HSA claims that "a trial court should view a parent's conduct cumulatively, reviewing both past and present conduct by the parent and how it impacted the child," with there never having been "any agreement between [respondent-mother] and the paternal grandmother that the ceding of all custodial duties and responsibilities was temporary in nature."

¶ 37 According to HSA, "the only distinction in [respondent-mother's] actions and those of the complaining parent in *Boseman* and *Price* is that

in those cases there was evidence *those parents* had provided primary parenting for the juveniles at some point in the past," while, in this case, "[b]oth Brianna and Brittany had lived with [the paternal grandmother] since birth, and the trial court's unchallenged findings show [that] '[the paternal grandmother] has provided all care for the children for much of their lives and especially the past 19 months.' " As a result, in light of "the totality of the circumstances," HSA contends that "the trial court's findings of fact thus supported its conclusion that [respondent-mother] acted in a manner inconsistent with her constitutionally protected status as a parent."[2]

¶ 38 A careful review of the record satisfies us that the trial court's findings suffice to support its conclusion that respondent-mother had "acted in a manner inconsistent with [her] constitutionally protected status as a parent." As an initial matter, we recognize that, despite the fact that the trial court labeled this determination as a finding of fact, it is, in reality, a conclusion of law, *see Boseman*, 364 N.C. at 549 (describing the trial court's determination that the defendant "has acted inconsistent[ly] with her paramount parental rights and responsibilities" as a "conclusion" of law subject to de novo review); *Adams*, 354 N.C. at 65 (labeling the trial court's determination that the father's conduct "has been inconsistent with his protected interest in the minor child" a "legal conclusion"), to which "[w]e are obliged to apply the appropriate standard of review . . . regardless of the label which it is given by the trial court," *In re J.S.*, 374 N.C. 811, 818 (2020) (citing *State v. Burns*, 287 N.C. 102, 110 (1975)). For that reason, we will examine the trial court's remaining findings of fact for the purpose of determining if they support its conclusion that respondent-mother had acted inconsistently with her constitutionally protected right to parent the children.

¶ 39 As we have already discussed, "[u]nfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy," but "[o]ther types of conduct, *which must be viewed on a case-by-case basis*, can rise to this level so as to be inconsistent with the protected status of natural parents." *Price*, 346 N.C. at 79 (emphasis added). For that reason, "there is no bright line rule beyond which a parent's conduct meets this standard;" instead, we examine each case individually in light of all of the relevant facts and circumstances and the applicable legal precedent. *Boseman*, 364 N.C. at 549. *See also Estroff v. Chatterjee*, 190 N.C. App. 61, 64 (2008) (acknowledging that "[n]o

2. The guardian ad litem has filed a brief urging us to affirm the Court of Appeals' decision advancing arguments that echo those advanced by HSA.

litmus test or set of factors can determine whether this standard has been met."). In conducting the required analysis, "evidence of a parent's conduct should be viewed cumulatively." *Owenby*, 357 N.C. at 147 (citing *Speagle*, 354 N.C. at 534–35).

¶ 40 The majority at the Court of Appeals upheld the challenged trial court order on the grounds that respondent mother had "act[ed] inconsistently with her parental rights by ceding her parental rights to a third party." *B.R.W.*, ¶ 42. As we held in *Price*, "a period of voluntary nonparent custody[ ] may constitute conduct inconsistent with the protected status of natural parents and therefore result in the application of the 'best interest of the child' test." *Price*, 346 N.C. at 79. In deciding *Price*, we placed substantial reliance upon *In re Gibbons*, in which we drew upon common law principles in holding that a parent's right to custody of his or her child may yield to the child's best interests in the event that the parent

> has voluntarily permitted the child to remain continuously in the custody of others in their home, and has taken little interest in it, thereby substituting such others in his own place, so that they stand in loco parentis to the child, and continuing this condition of affairs for so long a time that the love and affection of the child and the foster parents have become mutually engaged, to the extent that a severance of this relationship would tear the heart of the child, and mar his happiness.

247 N.C. 273, 280 (1957). In addition, we quoted, with approval, from a decision by the Supreme Court of Maine:

> "This petitioner for a period of more than four years showed not much more than a formal interest in his child. Circumstances were such that perhaps this was inevitable. He knew that the child was well cared for and was content to let the natural ties which bound him to his offspring grow very tenuous. Since the death of his wife there is little evidence that he has had any great yearning to have his child with him, to sacrifice for her, or to lavish on her the affection which would have meant so much to her in her tender years. Instead he surrendered this high privilege to the grandmother, who with the help of her unmarried daughters has given to this child the same devotion

> as it would have received from its own mother. Now having permitted all this to happen he claims the right, because he is the father, to sever the ties which bind this child to the respondent. In this instance the welfare of the child is paramount. The dictates of humanity must prevail over the whims and caprice of a parent."

Id. at 280–81 (quoting *Merchant v. Bussell*, 139 Me. 118, 124, 27 A.2d 816, 819 (1942)). Finally, we reiterated in *Owenby* that a parent's " 'failure to maintain personal contact with the child or failure to resume custody when able' could amount to conduct inconsistent with the protected parental interests[.]" *Owenby*, 357 N.C. at 146 (quoting *Price*, 346 N.C. at 84).

¶ 41 In *Price*, we directed trial courts, in evaluating cases involving nonparental custodial arrangements, to consider "the degree of custodial, personal, and financial contact [the parent] maintained with the child" after the parent left the child in the nonparent's care. *Price*, 346 N.C. at 84. In addition, we emphasized the importance of the issue of whether a nonparent custodial arrangement was intended to be temporary or indefinite:

> This is an important factor to consider, for, if defendant had represented that plaintiff was the child's natural father and voluntarily had given him custody of the child for an indefinite period of time with no notice that such relinquishment of custody would be temporary, defendant would have not only created the family unit that plaintiff and the child have established, *but also induced them to allow that family unit to flourish in a relationship of love and duty with no expectations that it would be terminated.*

Price, 346 N.C. at 83 (emphasis added); *see also Boseman*, 364 N.C. at 552 (noting that "the record indicates that defendant created no expectation that this [custody arrangement] was only temporary."). Finally, in *Speagle*, we held that, when a trial court resolves the issue of custody as between parents and nonparents, "any past circumstance or conduct which could impact either the present or the future of a child is relevant, notwithstanding the fact that such circumstance or conduct did not exist or was not being engaged in at the time of the custody proceeding." *Speagle*, 354 N.C. at 531.

¶ 42 In examining the facts of this case, we begin by reiterating that, even though respondent-mother challenged a number of the trial court's findings of fact as lacking in sufficient evidentiary support before the Court of Appeals, that court unanimously determined that this aspect of respondent-mother's argument to the trial court's order lacked merit, *see B.R.W.*, ¶ 56; *id.*, ¶ 59 (Carpenter, J., dissenting), and respondent-mother has not sought discretionary review of that aspect of the Court of Appeals' decision by this Court. As a result, the trial court's factual findings are deemed conclusive for the purposes of our evaluation of respondent-mother's challenge to the validity of the trial court's determination that she had acted inconsistently with her constitutionally protected right to parent Brittany and Brianna. *See In re T.N.H.*, 372 N.C. 403, 407 (2019) (noting that "[f]indings of fact not challenged by [the] respondent are deemed supported by competent evidence and are binding on appeal").

¶ 43 According to the trial court's findings of fact, respondent-mother left the father's home in 2015. At that time, respondent-mother surrendered custody of the children to the paternal grandmother and made no attempt to reunify with the children until after they had been taken into HSA custody. In the course of that three-year period, respondent-mother visited the children on holidays and birthdays without ever having taken the children to her home overnight or visiting with them on other than special occasions. Although respondent-mother has taken a more active role in the children's lives in recent years, including paying child support and engaging in overnight and weekend visitation, she was unable to obtain suitable housing for the children until approximately one month prior to the relevant permanency planning review hearing, at which point the children had been in HSA custody for over 19 months. In addition, the trial court found that, "although [respondent-mother] and [the stepfather] have completed their family service agreement and have a bond with the children, the strongest bond is with [the paternal grandmother]"; that both girls had experienced "adjustment issues" following weekend visitations with respondent-mother and the stepfather; and that the children want to live in the paternal grandmother's home. In light of our cumulative view of respondent-mother's conduct, *Owenby*, 357 N.C. at 147, as described in the trial court's findings of fact, we hold that the relevant findings support the trial court's conclusion that respondent-mother acted in a manner inconsistent with her constitutionally protected rights as a parent by voluntarily ceding the custody and care of her children to the parental grandmother for a period of three years.

¶ 44 In contradistinction to the situation at issue in *Price*, the trial court's findings of fact in this case reflect that respondent-mother had a minimal "degree of custodial, personal, and financial contact" with her children following their placement in the paternal grandmother's custody. *Price*, 346 N.C. at 84. The minimal degree of contact that respondent-mother had with the children prior to their placement in HSA custody indicates that respondent-mother intended for the paternal grandmother to continue to provide primary care for the children for "an indefinite period of time with no notice that such relinquishment of custody would be temporary," *id.*, 346 N.C. at 83, particularly given respondent-mother's failure to take any steps to regain custody of Brittany and Brianna until after they entered HSA custody, *see id.* (noting that, "to preserve the constitutional protection of parental interests in such a situation, the parent should notify the custodian upon relinquishment of custody that the relinquishment is temporary, and the parent should avoid conduct inconsistent with the protected parental interests"). As a result, the trial court's findings of fact show that respondent-mother "induced [the children and the paternal grandmother] to allow that family unit to flourish in a relationship of love and duty with no expectations that it would be terminated." *Id.*

¶ 45 The facts at issue in this case bear a strong resemblance to those that were before us in *Gibbons*, in which the child's adoptive father placed the child in the home of a nonparent married couple after the death of the father's wife at a time when the child was just two years old. *Gibbons*, 247 N.C. at 275. The child remained in the couple's home for the next five years with the exception of "short visits with the [father]," with the father having made occasional small financial contributions for the child's support, paid some medical bills, and given the child a few small presents. *Id.* During the time, the child "became greatly attached to the [custodial couple], considering them as his father and mother," and resisted being returned to his father's home. *Id.* at 279. After the father petitioned to regain custody of the child, the trial court found that both the custodial couple and the father, who had since remarried, were "fit and proper persons to have custody of the [child]" and that, since the father had legally adopted the child, it was in the child's best interest to be returned to his father. *Id.* at 276–77. In reversing the trial court's order, this Court emphasized that the father had voluntarily left the child in the couple's custody for five years and had shown little interest in him during that time, so that "the love and affection of the child and the foster parents have become mutually engaged," *id.* at 280, before holding that the trial court had failed to give sufficient consideration to the child's wishes and remanding the case to the trial court for further proceedings, *id.* at 282–83.

¶ 46 In this case, respondent-mother left the children with the paternal grandmother when they were one and four years old, respectively, and only paid them occasional visits over the course of the next few years. In other words, like the father in *Gibbons*, respondent-mother left responsibility for the children's care and wellbeing in the hands of the paternal grandmother, "where the sweet tendrils of childhood [had] first clung to all [they] [knew] of home," and where Brittany and Brianna developed a strong bond with the paternal grandmother, so that removing the children from the paternal grandmother's custody "would tear the heart of the child[ren], and mar [their] happiness." *Id.* at 280.[3] Although we acknowledge that *Gibbons* was decided well before the enactment of the current North Carolina Juvenile Code and our decisions in cases like *Adams* and *Troxel*, its reasoning is consistent with the logic that we adopted in *Price* and reinforces our conclusion that the trial court did not err by holding that respondent-mother had acted inconsistently with her constitutionally protected parental right to parent Brittany and Brianna.

¶ 47 In respondent-mother's view, the trial court's determination that she had acted inconsistently with her constitutionally protected right to parent her children cannot be squared with the trial court's determination that respondent-mother substantially complied with the provisions of her family services agreement. To be sure, respondent-mother's efforts to regain custody of her children following their placement into HSA custody are relevant to the issue of parental fitness, as the Court of Appeals recognized when it overturned the trial court's determination that respondent-mother was unfit. *B.R.W.*, ¶ 48.[4] As we held in *Price*, however, a lack of fitness is only one of the means by which a parent may act inconsistently with her constitutionally protected status as a parent, with a determination that the parent is not unfit being insufficient to compel a conclusion that the parent had not acted inconsistently with his or her constitutional right to parent his or her child in other ways. *Price*, 346 N.C. at 79; *see also David N. v. Jason N.*, 359 N.C. 303, 307 (2005) (holding that "the trial court's finding of [the father's] fitness in the instant case did not preclude it from granting joint or paramount

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3. Although the record contains conflicting evidence concerning the nature and extent of respondent-mother's involvement in the children's lives in the years after she placed them in the care of the paternal grandmother, the trial court resolved that factual dispute against respondent-mother's position.

4. As was the case with its determination that respondent-mother had acted inconsistently with her constitutionally protected status as a parent, the trial court labeled its determination that respondent-mother was "unfit" as a finding of fact. However, for the reasons discussed above, unfitness is more properly understood as a question of law, so we treat it as such. *See Raynor v. Odom*, 124 N.C. App. 724, 731 (1996).

custody to [the child's grandparents], based upon its finding that [the father's] conduct was inconsistent with his constitutionally protected status."); *Gibbons*, 247 N.C. at 276 (concluding that, even though the father was a "fit and proper person" to have custody of his son, he was not necessarily entitled to custody given that he had left his son in the custody of a non-parent for five years).

¶ 48 In addition, as we have recently observed, "a parent's compliance with his or her case plan does not preclude a finding of neglect." *In re J.J.H.*, 376 N.C. 161, 185 (2020) (citing *In re D.W.P.*, 373 N.C. 327, 339–40 (2020)). On the basis of similar logic, we hold that the fact that respondent-mother complied with the provisions of her family services agreement does not overcome the effect of her prior decision to surrender custody of her children to the paternal grandmother, particularly given the trial court's findings that the children's paramount bond was with the paternal grandmother rather than with respondent-mother and the difficulties that the children have experienced in being away from their grandmother. *See Speagle*, 354 N.C. at 531 (concluding that "any past circumstance or conduct which could impact either the present or future of the child is relevant[.]"). Although nothing in our opinion in this case should be understood to preclude any possibility that a parent who has taken affirmative steps, including compliance with the directives of a district court or social services agency, would be able to overcome the effects of past behavior that would be otherwise inconsistent with his or her constitutionally protected right to parent his or her child, we see nothing in the trial court's findings, in light of its analysis of the best interests of the children, that would prevent it from making the paternal grandmother the children's guardian in this case, notwithstanding respondent-mother's compliance with the provisions of her family services agreement.

¶ 49 In addition, we are not persuaded by respondent-mother's attempts to distinguish *Price* and *Boseman* from this case on essentially factual grounds. Simply put, nothing in either *Price* or *Boseman* suggests that the general principles enunciated in those decisions should be limited to the factual context in which those cases were decided. On the contrary, as a long line of precedent from both this Court and the Court of Appeals makes clear, a parent may, in fact, act inconsistently with his or her constitutional right to parent his or her child in the event that he or she voluntarily cedes custody of a child to a nonparent party for an indefinite period of time. *See*, *e.g.*, *David N.*, 359 N.C. at 305–07; *Owenby*, 357 N.C. at 146; *Gibbons*, 247 N.C. at 280; *Estroff*, 190 N.C. App. at 73–75; *Mason v. Dwinnell*, 190 N.C. App. 209, 224–26 (2008). Even if respondent-mother

never represented that the paternal grandmother had obtained parental status,[5] the absence of such a determination should not obscure the fact that respondent-mother "voluntarily permitted the child[ren] to remain continuously in the custody of [the paternal grandmother]," "continu[ed] this condition of affairs for so long a time that the love and affection of the child[ren] and [the paternal grandmother] [had] become mutually engaged," *Gibbons*, 247 N.C. at 280, and "created the existing family unit that includes [the paternal grandmother] and the child[ren], but not herself," *Price*, 346 N.C. at 83. As a result, we hold that the trial court made sufficient factual findings to support its conclusion that respondent-mother had acted in a manner inconsistent with her constitutionally protected status as the children's parent, so that the Court of Appeals did not err by upholding the trial court's decision with respect to this issue.

C. Best Interest of the Child

¶ 50 **[2]** In her second challenge to the Court of Appeals' decision to uphold the challenged trial court order, respondent-mother contends that the trial court's decision to make the paternal grandmother the children's guardian is not supported by its findings of fact or conclusions of law. In advancing this argument, respondent-mother begins by focusing upon Conclusion of Law No. 2, in which the trial court states that:

> [p]lacement of the children, [Brittany] and [Brianna], to [respondent-mother] or father's home at this time is contrary to their health, safety, welfare, and best interest. Conditions that led to the custody of the

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5. In view of our recognition in *Price* that the defendant had "represented to the child and to others that [the] plaintiff was the child's natural father," 346 N.C. at 83, respondent-mother argues that "it was clear to all involved that [the paternal grandmother] was the paternal grandmother of the children, not their parent." *Price* did not, however, hinge upon the extent to which the defendant specifically represented that the plaintiff was the child's parent. Instead, our decision in that case rested upon the defendant's "voluntary relinquishment of custody to [the] plaintiff," who had assumed the status of "the child's *de facto* father." *Id.* In addition to the *biological* relationship between the children and the paternal grandmother in this case, the trial court's findings clearly show that the paternal grandmother stood *in loco parentis* to Brittany and Brianna. *See Gibson v. Lopez*, 273 N.C. App. 514, 519 (2020) (defining "*in loco parentis*" as "one who has assumed the status of a parent without formal adoption.") (citations and quotation marks omitted); *Black's Law Dictionary* (11th ed. 2019) (defining "person in loco parentis" as "[s]omeone who acts in the place of a parent" or "a person who has assumed the obligations of a parent without formally adopting the child."). This fact, combined with respondent-mother's voluntary relinquishment of custody to the paternal grandmother for three years, makes *Price* the appropriate analytical framework through which to view this case. *See Price*, 346 N.C. at 83; *see also Gibbons*, 247 N.C. at 280.

> children by [HSA] and removal from the home of the parent(s) continue(s) to exist.

In respondent-mother's view, the trial court erred by making this determination because (1) the best-interests standard has no application in this instance given that she did not act inconsistently with her constitutional right to parent Brittany and Brianna and (2) the challenged conclusion of law is not supported by the trial court's findings of fact. More specifically, respondent-mother argues that her compliance with the provisions of her family services agreement, HSA's recommendation that a trial home placement be authorized in September 2019, and the trial court's decision to allow unsupervised visitation between respondent-mother and the children deprived the trial court's determination that "placement in [her] home [would be] contrary to the girls' health, safety and welfare" and that "the conditions that led to the custody of the children and removal from the home of the parent continue to exist" of sufficient support in the trial court's findings.

¶ 51 In addition, respondent-mother challenges the validity of Conclusion of Law No. 3, in which the trial court states that

> [HSA] has made reasonable efforts to finalize the permanent plan to timely achieve permanence for the children and prevent placement in foster care, reunify this family, and implement a permanent plan for the children. Foster placement has been avoided by placement with the paternal grandmother.

Consistent with her earlier arguments, respondent-mother directs our attention to the fact that she completed the requirements of her family services agreement before arguing that, since "HSA abruptly moved the [trial] court to award guardianship to the paternal grandmother, the trial court erred when it concluded that HSA's efforts to finalize the permanent plan of reunification were reasonable."

¶ 52 Finally, respondent-mother challenges the validity of Conclusion of Law No. 4, in which the trial court states that

> after considering priority placement of the minor child[ren] with a relative who is willing and able to provide proper care and supervision in a "safe home," the best interest of the minor children, [Brittany] and [Brianna], would be served by awarding guardianship to [the paternal grandmother].

As was the case with respect to Conclusion of Law No. 2, respondent-mother argues that the "best interest of the child" standard has no application in this case given that she had not acted inconsistently with her constitutionally protected right to parent Brittany and Brianna.

¶ 53 In responding to these arguments, HSA points out that neither Judge Carpenter nor respondent-mother appear to dispute the validity of the trial court's determination that making the paternal grandmother the guardian for the children was in their best interests and that, instead, respondent-mother appears to simply challenge the analytical rubric that the trial court utilized in making that determination. HSA argues that the children "had been in [HSA] custody for nineteen months at the [time of the 30 January 2020] hearing;" that "[t]hey deserved permanence with the relative who had shouldered all parental responsibilities and provided care, custody, and support for them since their birth;" that respondent-mother had "ceded all custody, control, and responsibility for the girls to [the paternal grandmother] when she left the girls in 2015;" and that, for all of these reasons, "it was in the [girls'] best interest to be in the guardianship of their grandmother."

¶ 54 Arguing in reliance upon *J.J.H.*, HSA contends that the fact that respondent-mother satisfied the requirements of her family services agreement does not, in and of itself, suffice to overcome the concerns that had initially prompted the children's placement in HSA custody, with those concerns having included respondent-mother's "lack of contact and involvement in the girls[']' lives for three years prior to [HSA] involvement and inappropriate housing." In addition, HSA argues that "[t]he lack of appropriate housing for [respondent-mother] continued up and through the time just prior to the [30 January 2020] permanency planning hearing" and that the trial court's findings with respect to this issue, coupled with its findings that the children continued to experience problems after spending the weekend with respondent-mother, that the children had lived with the paternal grandmother for most of their lives, and that the children had expressed a desire to continue living with the paternal grandmother "provide[d] ample support for the trial court's conclusion that placement of the children in [respondent-mother's] home would be contrary to their health, safety, welfare[,] and best interest."

¶ 55 A careful review of the record satisfies us that HSA has the stronger hand in this dispute. To the extent that respondent-mother's arguments rest upon a contention that she had not acted inconsistently with her constitutionally protected right to parent her children, we conclude, for the reasons set forth above, that this argument lacks merit, with it having been perfectly appropriate for the trial court to have applied the

"best interest of the child" standard in resolving the guardianship issue. *See Owenby*, 357 N.C. at 146 (noting that, "[o]nce a court determines that a parent has actually engaged in conduct inconsistent with the protected status, the 'best interest of the child test' may be applied without offending the Due Process Clause."). In addition, we hold that the trial court's findings of fact suffice to support its determination that the "[c]onditions that led to the custody of the children by [HSA] and removal from the home of the parent(s) continue(s) to exist." Although, as the Court of Appeals correctly noted, "the immediate impetus for removal of the children from the home where they had resided since birth—Father's intoxication and violence in the home—did not continue to exist" once the father had been arrested and the children had been placed with the paternal grandmother, *B.R.W.*, ¶ 53, the initial decision to place the children in HSA custody also rested upon respondent-mother's absence from the home for the last three years and her failure to obtain adequate housing for the children. As a result of the fact that respondent-mother's abdication of responsibility for the children in 2015 clearly contributed to their placement in HSA custody and the fact that respondent-mother had failed to obtain suitable housing until shortly before the 30 January 2020 permanency planning hearing despite the fact that HSA's involvement began in early to mid-2018, we hold that the trial court's findings of fact provide adequate support for its conclusion that the conditions that had led to the children's removal from the family home continued to exist.

¶ 56 Finally, as the Court of Appeals noted, respondent-mother has cited no authority, and we are aware of none, suggesting that a sudden change in the permanency planning recommendation made by a social service agency establishes that the agency had failed to make reasonable efforts toward reunifying the children with one or the other of their parents. On the contrary, the trial court's findings clearly demonstrate that HSA worked diligently to reunify respondent-mother with her children for well over a year and only changed its recommendation after receiving information concerning the children's negative reactions to their weekend visits with respondent-mother and the stepfather and the children's living preferences that HSA deemed relevant to their best interests. As a result, the trial court's findings of fact were more than adequate to support the challenged conclusions of law concerning the adequacy of HSA's reunification efforts.

III. Conclusion

¶ 57 Thus, for the reasons set forth above, we hold that the trial court's factual findings suffice to support its conclusion that respondent-mother

had acted inconsistently with her constitutionally protected right to parent her children and that the trial court did not err in applying the "best interest of the child" standard in awarding guardianship over the children to the paternal grandmother. As a result, we affirm the decision of the Court of Appeals.

AFFIRMED.

Justice EARLS dissenting.

¶ 58 Not every parent who leaves her child in someone else's care, even for an extended period of time, acts inconsistently with her constitutional status as a parent. Sometimes, a child needs something more or something different than what a parent can provide at a given moment. In these circumstances, a parent who cedes physical custody of a child to another trusted adult—for example, a child's grandparent—may be making the painful but necessary choice that protects that child from harm and puts that child in a better place. Recognizing these complexities, this Court has "emphasize[d] . . . that there are circumstances where the responsibility of a parent to act in the best interest of his or her child would require a temporary relinquishment of custody, such as under a foster-parent agreement or during a period of service in the military, a period of poor health, or a search for employment." *Price v. Howard*, 346 N.C. 68, 83 (1997).

¶ 59 And not every family looks like two parents and a child. *Cf. Michael H. v. Gerald D.*, 491 U.S. 110, 141 (1989) ("We are not an assimilative, homogeneous society, but a facilitative, pluralistic one . . . . Even if we can agree, therefore, that 'family' and 'parenthood' are part of the good life, it is absurd to assume that we can agree on the content of those terms and destructive to pretend that we do.") (Brennan, J., dissenting). Grandparents, aunts and uncles, siblings, cousins, faith leaders, trusted friends—all have been called upon at various times in many communities to perform a vital function caring for children other than their own. *Moore v. City of East Cleveland*, 431 U.S. 494, 508 (1977) ("The Constitution cannot be interpreted . . . to tolerate the imposition by government upon the rest of us of white suburbia's preference in patterns of family living. The 'extended family' that provided generations of early Americans with social services and economic and emotional support in times of hardship . . . remains not merely still a pervasive living pattern, but under the goad of brutal economic necessity, a prominent pattern virtually a means of survival for large numbers of the poor and deprived minorities of our society.") (Brennan, J., concurring). In

these circumstances, the involvement of other adults in childrearing does not make that child's parent any less of a parent. Consistent with the reality that family life takes many different forms, a parent's conduct in a situation involving nonparental caregivers "need[s] to be viewed on a case-by-case basis" to determine if it justifies overriding "the constitutional protection of parental interests in such a situation." *Price*, 346 N.C. at 83.

¶ 60 In its decision today, this Court chooses to look away from the complexities and realities of family life in this state. Its choice is not compelled by our precedents, which recognize that a trial court must conduct a case-specific inquiry and enter factual findings addressing the circumstances surrounding a parent's departure before determining that a parent who has left her children in someone else's care has acted inconsistently with her constitutional status as a parent. Our precedents are clear that absent sufficient findings, the proper course is to vacate and remand for further proceedings. *See Price*, 346 N.C. at 84. Nevertheless, the majority chooses to affirm an order that is devoid of findings addressing questions that needed to be answered before dislodging respondent-mother's parental rights. The majority proceeds to compound the error by concluding that the trial court order contains adequate findings of fact to support its conclusion that the conditions leading the Yadkin County Human Services Agency (HSA) to take custody of respondent-mother's children "continue[ ] to exist," notwithstanding respondent-mother's uncontroverted success in completing the terms of her family services agreement and securing a safe and stable home for her children.

¶ 61 This Court's decision puts parents who are trying to navigate challenging circumstances, including those who are experiencing domestic violence, in an impossible bind: while a parent who chooses to remain in an unsafe living environment with her children risks having her children adjudicated neglected or her parental rights terminated, a parent who escapes a dangerous living environment but needs time to get back on her feet risks having her parental rights displaced precisely because of her efforts to seek out a safe and stable home. *Compare In re T.B.*, 2022-NCSC-43, ¶ 26 (affirming order terminating parental rights on ground of neglect in part because "[r]espondent-mother did not immediately end the relationship and separate from respondent-father" after respondent-father committed acts of domestic violence) *with In re I.K.*, 377 N.C. 417, 2021-NCSC-60, ¶ 35 (affirming order determining that respondent acted inconsistently with his constitutionally protected status as a parent after he "voluntarily placed [his child] with [the child's]

maternal grandmother 'until [his] housing situation was resolved' "). This Court's decision also potentially signals to parents that even if they comply with every element of a case plan or family services agreement developed during a juvenile proceeding, their parental rights are always subject to displacement should a court decide that another caregiver offers a "better" home for their child. That is contrary to what our statutes provide and what the constitution requires. Therefore, I respectfully dissent.

I. The trial court's determination that respondent-mother acted inconsistently with her constitutional parental status

¶ 62 On an appeal from a permanency planning order, our review is limited to "determin[ing] whether the [trial court's] findings are supported by clear, cogent, and convincing evidence and . . . whether [the] trial court's *findings of fact* support its conclusions of law." *In re S.R.F.*, 376 N.C. 647, 2021-NCSC-5, ¶ 9 (quoting *In re J.S.*, 374 N.C. 811, 814–15 (2020) (emphasis added)). As an appellate court, we are charged with applying the law in light of the undisturbed *findings* the trial court enters. *Coble v. Coble*, 300 N.C. 708, 713 (1980) ("[A] conclusion of law . . . must itself be based upon supporting *factual findings*.") (emphasis added). Our task is not to root around in the record to fill in gaps based on what we think the trial court could or should have found but did not. *Id.* at 713–14 ("It is true that there is evidence in the record from which findings could be made which would in turn support the [trial court's legal] conclusion . . . . What all this evidence does show, however, is a matter for the trial court to determine in appropriate factual findings."). This limitation on the scope of appellate review reflects both our lack of institutional competence to find facts and our recognition that a trial court may choose *not* to find a particular fact even when there is evidence in the record that could support a particular finding. *Id.* at 712–13 ("It is not enough that there may be evidence in the record sufficient to support findings which could have been made. The trial court must itself determine what pertinent facts are actually established by the evidence before it, and it is not for an appellate court to determine de novo the weight and credibility to be given to evidence disclosed by the record on appeal.").

¶ 63 It is undoubtedly correct that, as the majority recites, "a period of voluntary nonparent custody[ ] *may* constitute conduct inconsistent with the protected status of natural parents and therefore result in the application of the 'best interest of the child' test." *Price*, 346 N.C. at 79. But a period of voluntary nonparent custody also may *not* constitute

conduct inconsistent with a parent's constitutional status. As this Court recognized in *Price*, "there are circumstances where the responsibility of a parent to act in the best interest of his or her child would require a temporary relinquishment of custody, such as under a foster-parent agreement or during a period of service in the military, a period of poor health, or a search for employment." *Id.* at 83. To decide what legal significance to assign to a parent's actions, courts look to a variety of factors indicative of the parent's conduct and intentions at the time custody is ceded to a third-party, including "whether [the parent's] voluntary relinquishment of custody to [a caregiver] was intended to be temporary or indefinite and whether [the parent] informed [the caregiver] and the child that the relinquishment of custody was temporary." *Id.* "[W]hen a parent brings a nonparent into the family unit, represents that the nonparent is a parent, and voluntarily gives custody of the child to the nonparent without creating an expectation that the relationship would be terminated, the parent has acted inconsistently with her paramount parental status." *Boseman v. Jarrell*, 364 N.C. 537, 550–51 (2010).

¶ 64 Accordingly, an order determining that a parent has acted inconsistently with his or her parental status should contain findings addressing the factors that must be considered in order to distinguish between conduct that does, and conduct that does not, comprise a forfeiture of that parent's parental rights. When the order does not contain those findings and the record is inconclusive, remand is necessary. Thus, in *Price*, we vacated a custody order and remanded to the trial court for further proceedings "because the trial court made no findings about whether [the parent] and [the caregiver] agreed that the surrender of custody [to the caregiver] would be temporary, or about the degree of custodial, personal, and financial contact [the parent] maintained with the child after the parties separated." *Id.* at 84. Even though it was "clear from the record" that the parent "created the existing family unit that includes [the caregiver] and the child, but not herself," "represented to the child and to others that [the caregiver] was the child's natural father," and "chose to rear the child in a family unit with plaintiff being the child's de facto father," we held that a remand was necessary because the record evidence "shows that the parties disputed whether defendant's voluntary relinquishment of custody to plaintiff was intended to be temporary or indefinite[.]" *Id.* at 83. Because the *trial court* did not enter any findings addressing this question, we explained that "we cannot conclude whether [the parent] should prevail based upon the constitutionally protected status of a natural parent or whether the 'best interest of the child' test should be applied." *Id.* at 84; *see also Powers v. Wagner*, 213 N.C. App. 353, 363 (2011) ("While the record contains evidence related

to the scenarios identified in *Price*, it was the responsibility of the trial court to make the necessary factual findings. Without the necessary findings, there can be no determination that [the mother] acted inconsistently with her constitutional right to parent.").

¶ 65 I certainly agree with the majority that "the general principles enunciated" in *Price* and subsequent cases are applicable in this case. That is why it is so puzzling that the majority chooses to affirm the trial court's order in this case in the absence of any finding addressing whether respondent-mother intended, and the paternal grandmother understood, the paternal grandmother's caregiving arrangement to be temporary or permanent. The only findings the trial court entered that address the circumstances of respondent-mother's leaving the children with the paternal grandmother are as follows:

> 13. [Brittany] and [Brianna] have been placed with their paternal grandmother . . . since June 14, 2018 (now 19 months). Both children have actually resided in [the paternal grandmother's] home since birth – prior to June 14, 2018 either both or one of their parents also resided in the home. The mother and father resided in the home together with the children until September 2015 when the mother left (the parents separated).
>
> 14. After September 2015 the mother would visit the children on holidays [and] birthdays but did not take the children overnight.
>
> . . . .
>
> 28. When the mother left the [family] home in September 2015 she was scared. She did not take the children with her because of being frightened and because she did not have a stable home to provide the children. The mother married [her current husband] is [sic] 2016. She has not had a stable home that was large enough for the girls until recently.
>
> . . . .
>
> 34. The [c]ourt finds the [respondent-mother] . . . by clear and convincing evidence . . . ha[s] acted in a manner inconsistent with [her] constitutionally protected status as a parent.

These findings tell us why and when respondent-mother left the home; they say nothing "about whether [the parent] and [the caregiver] agreed that the surrender of custody [to the caregiver] would be temporary." *Price*, 346 N.C. at 83. Furthermore, respondent-mother's intentions upon leaving the home were disputed; respondent-mother testified that she did not take her children with her "[b]ecause [she] didn't have a stable place" to live, so she left them with their paternal grandmother "until I could find me something stable." The same unresolved factual issue that compelled us to remand in *Price* went unresolved by the trial court in this case.

¶ 66 The trial court's order also tells us nothing about whether respondent-mother "represent[ed] that" the paternal grandmother was "a parent" to Brittany and Brianna, whether the paternal grandmother understood herself to be the children's parent, and what the children understood the situation to be. *Boseman*, 364 N.C. at 550–51. Confronted with an order containing insufficient findings, this Court should follow its own precedent and remand, just as we did in *Price*.

¶ 67 The majority attempts to obscure the absence of necessary factual findings from the trial court's order by ascribing outsized meaning to the findings the trial court actually made. For example, the majority states that the

> minimal degree of contact that respondent-mother had with the children prior to their placement in HSA custody further indicates that respondent-mother intended for the paternal grandmother to continue to provide primary care for the children for "an indefinite period of time with no notice that such relinquishment of custody would be temporary," particularly given respondent-mother's failure to take any steps to regain custody of Brittany and Brianna until after they entered HSA custody[.]

That is quite a leap from the trial court's finding that "the mother would visit the children on holidays [and] birthdays but did not take the children overnight." It is unclear precisely how or why respondent-mother's maintenance of consistent (although somewhat infrequent) contact with her children while they were in the paternal grandmother's care demonstrates she intended the paternal grandmother to be the children's caregiver indefinitely. If it is because respondent-mother "did not take the children overnight," well, consider the alternative: if respondent-mother had hosted her children for overnight visits despite not having a "stable"

place to live, it is easy to imagine a court finding that she had jeopardized their welfare by doing so. *Cf. In re M.A.*, 378 N.C. 462, 2021-NCSC-99, ¶ 30 (affirming a termination order on the basis of neglect in part because "[a]t the time of the termination hearing, respondent was . . . sharing a studio apartment with an unknown roommate, was not listed on the lease as a tenant, and was not paying utilities for the apartment").

¶ 68 In the alternative, the majority implies that the requirements of *Price* have been met because "the trial court's findings clearly show that [the children's paternal grandmother] stood *in loco parentis* to Brittany and Brianna." Putting aside the majority's lack of an explanation as to which findings "clearly show" this to be true, it cannot be the case that determining whether the paternal grandmother stood *in loco parentis* to Brittany and Brianna is "the relevant inquiry for purposes of our analysis" under *Price*. As the Court of Appeals has correctly explained,

> [t]he fact that a third party provides caretaking and financial support, engages in parent-like duties and responsibilities, and has a substantial bond with the children does not necessarily meet the requirements of *Price* . . . . Those factors could exist just as equally for . . . a step-parent or simply a significant friend of the family, who might not meet the *Price* standard.

Estroff v. Chatterjee, 190 N.C. App. 61, 74 (2008). Presumably, the majority does not mean to imply that every parent who has allowed another adult to stand *in loco parentis* to his or her child has acted inconsistently with his or her status as a parent. *See Drum v. Miller*, 135 N.C. 204, 216 (1904) (stating that a teacher stands *in loco parentis* to students when they are present at school); *Craig v. Buncombe Cty. Bd. of Educ.*, 80 N.C. App. 683, 686 (1986) (explaining that "the need to control the school environment and the school board's position *in loco parentis*" allows school authorities to regulate students' conduct while at school).

¶ 69 The majority also relies on *In re Gibbons*, 247 N.C. 273 (1957), a case that, as the majority acknowledges, "was decided well before the enactment of the current North Carolina Juvenile Code and our decisions in cases like *Adams* and *Troxel*[.]" According to the majority, "[t]he facts at issue in this case bear a strong resemblance to those that were before us in *Gibbons*, in which the child's adoptive father placed the child in the home of a nonparent married couple after the death of the father's wife at a time when the child was just two years old." Notably, the majority overlooks a crucial factual distinction between *Gibbons* and this case: in the former, the trial court entered a "finding[ ] of fact" that

shortly after taking custody of the child, the nonparent married couple "requested [the father] to take [the child], but [the father] declined to do so and *indicated at the time that he desired that the boy should remain permanently* with the [nonparent married couple]." *Gibbons*, 247 N.C. at 279 (emphasis added). *Gibbons* confirms rather than detracts from *Price*'s conclusion that a remand is appropriate in the absence of findings addressing what a parent intended when ceding custody to a nonparental caregiver and what the nonparental caregiver agreed to when taking custody of the parent's child.

¶ 70 *Gibbons* is also unlike this case in another important way. In *Gibbons*, it appears that the father asserted his interest in parenting his son by going "into the Sunday School Room of the New Hope Baptist Church, and carr[ying] this boy away with him, in spite of his screaming, protests and efforts to escape." *Id.* at 279–80. That bears no resemblance to how respondent-mother asserted her interest in parenting Brittany and Brianna. Here, respondent-mother indicated her desire to reassume custody of her children when HSA got involved in their lives. Over the next two years, she did everything HSA asked of her—as the trial court found, she "completed [her] family service agreement" and secured a stable home for her children. The very purpose of a family services agreement or case plan is to inform a parent of what he or she needs to do in order to "address[ ] the barriers to reunification between [a] respondent-[parent] and [the parent's child]." *In re S.D.*, 374 N.C. 67, 73 (2020). If "evidence of a parent's conduct should be viewed cumulatively," *Owenby v. Young*, 357 N.C. 142, 147 (2003), then respondent-mother's undisputed progress in eliminating the barriers HSA identified to reunification with Brittany and Brianna must count for something. Yet in the majority's analysis, respondent-mother's demonstrable progress towards reunification is essentially meaningless.

¶ 71 The majority's rejoinder to this argument is that just as "a parent's compliance with his or her case plan does not preclude a finding of neglect,"

> the fact that respondent-mother complied with the provisions of her family services agreement does not overcome the effect of her prior decision to surrender custody of her children to the paternal grandmother, particularly given the trial court's findings that the children's paramount bond was with the paternal grandmother rather than with respondent-mother and the difficulties that the children have experienced in being away from their grandmother.

I agree that a parent's compliance with a case plan does not, on its own, necessarily negate the claim that a parent has acted inconsistently with her parental status. Still, if a parent's completion of the terms of a family services agreement is a complete non-factor when it comes time to decide whether or not the parent can exercise her parental rights, it calls into question the value of these family services agreements as tools to help parents address the conditions leading to the removal of a child and to ultimately achieve reunification. HSA told respondent-mother she needed to do various things to reunite with her children; respondent-mother did everything HSA asked of her; today, this Court tells respondent-mother that she cannot reunify with her children because of something she did before she ever entered into the agreement with HSA. It is difficult to imagine what else respondent-mother could have done to reestablish herself as a parent to her children.

¶ 72 Separately, it is notable that even when the majority is purporting to assess whether respondent-mother acted inconsistently with her constitutional parental status—a question that is necessarily analytically prior to the question of whether placing the children with respondent-mother is in the children's best interests—the majority slips into reasoning based upon its view of the children's best interests by comparing the relative strength of the children's bond with their mother and their paternal grandmother. Although all courts administering North Carolina's Juvenile Code share an interest in achieving the best possible outcome for all children, a parent's constitutional rights cannot be disturbed based solely upon a court's subjective beliefs regarding the comparative benefits of two different placement options. *Owenby v. Young*, 357 N.C. 142, 146 (2003) (explaining that it is only "[o]nce a court determines that a parent has actually engaged in conduct inconsistent with the protected status[that] the 'best interest of the child test' may be applied without offending the Due Process Clause"). In concluding that respondent-mother has acted inconsistently with her parental status in part because the children have a stronger bond with their paternal grandmother—even though the undisputed findings establish that the children also feel bonded to respondent-mother—the majority collapses the threshold inquiry concerning whether a parent's constitutional parental rights can be displaced into the subsequent judgment regarding whether a parent's parental rights should be displaced.

¶ 73 In light of the profound importance of a trial court's threshold determination that a parent has acted inconsistently with her parental status, this Court should at least adhere to our precedents requiring trial courts to enter adequate findings of fact to support this determination. When

presented with a trial court order lacking adequate findings, our precedents dictate that we remand for further factfinding rather than assuming an answer in the absence of necessary information.

¶ 74 "The purpose of the requirement that the court make findings of those specific facts which support its ultimate disposition of the case . . . is [ ] not a mere formality or a rule of empty ritual." *Coble*, 300 N.C. at 712. Rather, the purpose of the requirement "is to allow a reviewing court to determine from the record whether the judgment and the legal conclusions which underlie it represent a correct application of the law" and to "to allow the appellate courts to perform their proper function in the judicial system." *Id.* (cleaned up). Requiring the factfinder to find facts during an adversarial proceeding is at the heart of ensuring a rigorous and disciplined search for the truth, based on evidence presented in court and subject to cross-examination. *State v. Bartlett*, 368 N.C. 309, 313 (2015) ("The trial judge who presides at a [ ] hearing sees the witnesses, observes their demeanor as they testify and by reason of his [or her] more favorable position, he [or she] is given the responsibility of discovering the truth.") (cleaned up). It is a core feature of our system of justice and the only way meaningful review by an appellate court can ensure that all parties are treated fairly and equally under the law. In this context, vacating an order that does not contain findings of fact addressing "both the legal parent's conduct and his or her intentions" is necessary to accurately determine the legal significance of respondent-mother's actions and "to ensure that the situation is not one in which the third party has assumed a parent-like status on his or her own without that being the goal of the legal parent." *Estroff*, 190 N.C. App. at 70. Accordingly, consistent with our precedents, we should vacate the trial court's order and remand for further proceedings.

II. The trial court's determination that awarding guardianship to the children's paternal grandmother is in the children's best interests

¶ 75 Because the trial court's findings do not support its conclusion that respondent-mother acted inconsistently with her parental status, I would not reach the question of whether to affirm the trial court's determination that awarding guardianship to Brittany's and Brianna's paternal grandmother was in the children's best interests. Still, I write to note my disagreement with one aspect of the majority's reasoning on this issue.

¶ 76 The majority holds that the trial court's conclusion that "[c]onditions that led to the custody of the children by [HSA] and removal from

the home of the parent(s) continue(s) to exist" is supported by the trial court's findings of fact. Specifically, the majority reasons that

> [a]s a result of the fact that respondent-mother's abdication of responsibility for the children in 2015 clearly contributed to their placement in HSA custody and the fact that respondent-mother had failed to obtain suitable housing until shortly before the 30 January 2020 permanency planning hearing despite the fact that HSA's involvement began in early to mid-2018, we hold that the trial court's findings of fact provide adequate support for its conclusion that the conditions that had led to the children's removal from the family home continued to exist.

But another way of saying that "respondent-mother had failed to obtain suitable housing until shortly before the 30 January 2020 permanency planning hearing" would be to say that "respondent-mother obtained suitable housing before the 30 January 2020 permanency planning hearing." If the trial court had entered findings indicating that respondent-mother was dilatory in seeking out housing options or otherwise refused to take necessary steps to secure and maintain a suitable home, then the fact that she had only recently secured suitable housing might have been relevant. Absent such findings, there is no way for this Court to know if the reason respondent-mother did not more rapidly obtain suitable housing was because of her own actions or because of factors out of her control, such as the difficulty many families face when attempting to locate and secure affordable housing. If respondent-mother could not obtain suitable housing because of her lack of resources, her inability to obtain suitable housing would not be a permissible basis for displacing her constitutional parental rights. *Cf. In re M.A.*, 374 N.C. 865, 881 (2020) ("[Parental rights are not subject to termination in the event that [a parent's] inability to care for her children rested solely upon poverty-related considerations."). Regardless, it is wrong to state that respondent-mother's lack of suitable housing was a condition that "continue[d] to exist" at the time of the termination hearing when the trial court's own findings confirm she had obtained suitable housing prior to the termination hearing.

III. Conclusion

¶ 77 Respondent-mother left her children and her family home after the children's father, who had just been released from prison, returned and resumed using drugs and alcohol. She was "scared" of the children's father and "did not take [her two] children with her because of being frightened

and because she did not have a stable home to provide the children." Instead, she left the children in the care of their paternal grandmother, who had lived with respondent-mother and the children in their home and with whom respondent-mother maintained a constructive relationship. Over the next three years, respondent-mother visited the children for birthdays and holidays but did not host them for overnight visits. After the children's father was arrested again, local authorities got involved to ensure the children's well-being. At this point, respondent-mother indicated that she wanted to take the children back into her care, agreed to a case plan specifying what she needed to do to achieve reunification, and subsequently complied with every term of that agreement and secured the safe and stable home she previously lacked.

¶ 78 That is, essentially, the sum total of what the trial court's findings of fact tell us with respect to the question of whether respondent-mother acted inconsistently with her constitutional status as a parent. On the basis of these findings, the majority concludes that respondent-mother's parental rights can be displaced and affirms an order awarding guardianship to the children's paternal grandmother over the respondent-mother's wishes. These circumstances certainly could encompass a situation where respondent-mother by her conduct forfeited her parental rights. But they could also encompass a situation where respondent-mother responsibly safeguarded her children's interests by making a difficult decision under trying circumstances. Absent sufficient findings, it is improper for this Court to presume it was the former situation and not the latter.

¶ 79 The majority's decision potentially sends an unfortunate message to parents who have experienced difficulties raising their children but who are nonetheless working diligently towards reunification. Although this Court's decision today displaces her legal status as Brittany and Brianna's parent, respondent-mother's efforts to reunify with her children cannot be diminished. As respondent-mother testified at the permanency planning hearing:

> I mean, I just want to make it clear – I mean it seems like I been – I feel like you put me out here to – like I've never been there. I mean, I – I'm the one that had them. Yes, I've been there. I'm the one that stayed in the hospital with [Brittany] after I had a C section and caught two infections. I was out for over two weeks. Had to have a blood transfusion. Nobody else there was with me. He left me there. Nobody was with me. I've been there. They're my girls and I love them.

Accordingly, I respectfully dissent.

IN RE C.A.B.

[381 N.C. 105, 2022-NCSC-51]

IN THE MATTER OF C.A.B.

No. 138A21

Filed 6 May 2022

Termination of Parental Rights—motion to continue—extraordinary circumstances—incarcerated parent—COVID-19 lockdown

The trial court erred by denying a father's motion to briefly continue the adjudicatory hearing on a petition to terminate his parental rights where the prison in which the father was incarcerated was under lockdown due to COVID-19, preventing him from preparing for the hearing with his attorney and testifying on his own behalf. The lockdown at the prison was an "extraordinary circumstance" allowing the hearing to be continued beyond the statutory ninety-day period; the father's absence created a meaningful risk of error that undermined the fundamental fairness of the hearing because the father could not meet with counsel before the hearing, each of the four grounds for termination required a careful assessment of his conduct in prison, and no other witness was available to testify as to that information; and the error was prejudicial.

Chief Justice NEWBY dissenting.

Justices BERGER and BARRINGER join in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order terminating respondent-father's parental rights entered on 2 February 2021 by Judge Kathryn Whitaker Overby in District Court, Alamance County. Heard in the Supreme Court on 22 March 2022.

Jamie L. Hamlett for petitioner-appellee Alamance County Department of Social Services.

Christina Freeman Pearsall for appellee Guardian ad Litem.

Mercedes O. Chut for respondent-appellant father.

EARLS, Justice.

IN RE C.A.B.

[381 N.C. 105, 2022-NCSC-51]

¶ 1 In this case we consider whether a parent who was incarcerated at the time of an adjudicatory hearing on a motion to terminate his parental rights was entitled to a continuance in order to have the opportunity to be present at the hearing. Respondent-father was incarcerated when he first learned that he was the father of a newborn, Caleb,[1] and he remained in detention throughout the duration of Caleb's juvenile proceedings. He expressed a desire to parent Caleb upon his release and opposed the effort to terminate his parental rights. On the day of the adjudicatory hearing, respondent-father was unable to appear due to a lockdown at his prison necessitated by the COVID-19 pandemic. According to respondent-father's counsel, the lockdown was set to expire in five days. Nonetheless, the trial court denied respondent-father's motion to continue the hearing and ultimately entered an order terminating his parental rights.

¶ 2 Parents, including incarcerated parents, possess a "fundamental liberty interest[ ]" which "includes the right of parents to establish a home and to direct the upbringing and education of their children." *Owenby v. Young*, 357 N.C. 142, 144 (2003) (cleaned up). Thus, "[w]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *In re Murphy*, 105 N.C. App. 651, 653 (quoting *Santosky v. Kramer*, 455 U.S. 745, 753–54 (1982)), *aff'd per curiam*, 332 N.C. 663 (1992). In this case, respondent-father was denied the opportunity to present testimony at the termination hearing and to work with his counsel to develop and execute a strategy to oppose termination of his parental rights. Furthermore, the substantive findings in support of the trial court's decision to terminate respondent-father's parental rights all directly related to his conduct in prison, a subject respondent-father's testimony would have aided the court in assessing. Accordingly, the trial court's denial of respondent-father's motion to continue the adjudicatory hearing undermined the fairness of that hearing. We conclude that the trial court prejudicially erred and we vacate the order terminating respondent-father's parental rights.

I. Background.

¶ 3 On 28 January 2019, the Alamance County Department of Social Services (DSS) assumed custody of Caleb, who was four days old, after his mother tested positive for cocaine at Caleb's birth. No father was listed on Caleb's birth certificate, but Caleb's mother identified respondent-father as a possible biological father. At the time of Caleb's

1. We use a pseudonym to protect the identity of the juvenile and for ease of reading. *See* N.C. R. App. P. 42(b). The juvenile's mother is not a party to this appeal.

birth, respondent-father was detained on federal charges including obtaining property by false pretenses, possession of stolen goods, and possession of a firearm by a felon. Eleven days after DSS took custody of Caleb, respondent-father took a paternity test which established to a near certainty that he was Caleb's biological father.

¶ 4 On 14 March 2019, a DSS social worker visited respondent-father at the Alamance County Detention Center, where he was being held pending the resolution of the federal charges against him. At the time, respondent-father told the social worker that he thought he was "looking at three years in prison," but that he "would like for his son to be with family" and "would like to work to regain custody of his son when he is released from prison." He identified three relatives as potential alternative caregivers. None of the three relatives agreed to take custody of Caleb; however, the social worker subsequently learned that respondent-father's sister, Larissa, was willing to care for Caleb if she could also adopt him. DSS ordered a home study to determine if Larissa would be a suitable placement.

¶ 5 Before the home study was completed, Caleb was adjudicated to be a neglected and dependent juvenile. DSS retained nonsecure custody. The court approved a case plan proposed by DSS requiring respondent-father to:

- Develop a sufficient source of income to support himself and the child and use funds to meet basic needs. He can work to achieve this goal by applying for a minimum of five jobs a week, submitting monthly job search log[s] and taking part in job-readiness programs.
- Provide a safe, stable and appropriate home environment. He can work to achieve this goal by applying for housing at five locations a week and providing a monthly log to the social worker, saving sufficient funds for deposits, complying with the terms of his lease, maintaining the home in a fit and habitable condition and keeping working utilities.
- Refrain from allowing his substance abuse to affect his parenting of his child and provide a safe, appropriate home by not exposing his child to an injurious environment.

- Obtain and follow the recommendations of a substance abuse assessment, refrain from using illegal or illicit substances or abusing prescription medication[s], provide a home environment free of illegal or illicit substances and/or persons who are using or under the influence of such.
- Demonstrate the ability to implement age-appropriate disciplinary practices and parenting skills.
- Attend a parenting curriculum and demonstrate appropriate skills during visitation.

Although the trial court noted that respondent-father's "visitation is suspended due to the limits of visits in the Alamance County [detention center]," the court did not otherwise adapt respondent-father's case plan to reflect the circumstances of his incarceration.[2]

¶ 6 Subsequently, DSS received a favorable home study for Larissa and her husband, and Caleb was placed in their home on 3 May 2019. To facilitate Caleb's adoption by Larissa, respondent-father executed a relinquishment of his parental rights specifically to his sister and brother-in-law. Caleb's mother also relinquished her parental rights. Both parents were released as parties to Caleb's juvenile proceedings. In April 2020, DSS received final approval for Larissa and her husband to adopt Caleb.

¶ 7 But, later that same month, Larissa informed DSS that she "feels overwhelmed with everything that is going on in her life right now." She also expressed concern that, notwithstanding their relinquishments, respondent-father and Caleb's mother "are going to want to be in and out of his life because [they are] family once [Caleb's] adopted." Larissa explained that she had arrived at the conclusion "that she just couldn't keep [Caleb]" and that it was "in his best interest . . . to go to a deserving family . . . where his birth parents couldn't mess up his life." On 4 May 2020, DSS notified respondent-father and Caleb's mother that Larissa's adoption of Caleb would not go forward. Respondent-father subsequently revoked his specific relinquishment of his parental rights. Caleb was removed from Larissa's home and placed with foster parents.

¶ 8 On 15 July 2020, the trial court restored respondent-father as a party to Caleb's juvenile proceedings and appointed him an attorney. DSS had difficulty establishing contact with respondent-father, who by this time

2. The trial court also developed a separate case plan for Caleb's mother but that plan is not at issue in this appeal.

was being held at the Beckley Federal Correctional Institution in West Virginia. Eventually, respondent-father notified DSS and the court that he "no longer wanted [Caleb] to be adopted by someone new because he had already gotten a full year closer to being released since he initially executed his specific relinquishment." Respondent-father asserted that he "has not had any write-ups or engaged in any trouble since his incarceration in May of 2018," "has taken courses at the prison in order to be a better father for [Caleb]," and "has a job in the penitentiary kitchen"; in addition, he stated that he "started a rehabilitation program for drug abuse" and signed up to "take a parenting class" but that both had been suspended due to COVID-19. Respondent-father also provided the names of additional relatives to be considered as potential placements for Caleb, including respondent-father's own parents.

¶ 9 On 12 August 2020, the trial court approved an updated case plan requiring respondent-father to

> participate in Parenting classes through the prison . . . demonstrate appropriate and safe parenting choices . . . maintain communication with [DSS] . . . engage in Mental Health services provided through the prison . . . demonstrate good coping skills . . . participate in his 100-hour rehab program through the prison . . . help provide for the needs of [Caleb] . . . give consent for his case manager to provide [DSS with] information regarding his stay in prison . . . [and] upon [his] release from prison . . . engage in activities to obtain and maintain an appropriate home for he and [Caleb]; . . . maintain a way to meet the[ir] daily needs . . . [and] refrain from illegal activities that could cause him to be arrested and incur more prison time . . . .

The court maintained a primary plan of adoption with a secondary plan of guardianship and ordered DSS to perform a home study of Caleb's paternal grandparents. The trial court later determined that "though the paternal grandparents have a suitable home and the financial ability to provide for the Juvenile . . . [Caleb] should remain in the current foster placement progressing to adoption by the [f]oster [f]amily."

¶ 10 On 28 August 2020, DSS filed a motion in the cause seeking termination of respondent-father's parental rights. DSS asserted that termination was warranted on four grounds: neglect pursuant to N.C.G.S. § 7B-1111(a)(1); willful failure to make reasonable progress to correct the conditions that led to Caleb's removal pursuant to

N.C.G.S. § 7B-1111(a)(2); willful failure to pay a reasonable portion of Caleb's cost of care pursuant to N.C.G.S. § 7B-1111(a)(3); and incapability to provide for Caleb's proper care and supervision pursuant to N.C.G.S. § 7B-1111(a)(6). A hearing on the motion to terminate parental rights was initially set for 21 October 2020; however, this hearing was continued at respondent-father's counsel's request because counsel was "not available for [the] hearing." A subsequent hearing scheduled for 16 December 2020 was continued until 20 January 2021 due to the renewal of an Emergency Directive issued by then-Chief Justice Beasley in response to the ongoing COVID-19 pandemic.

¶ 11 On 12 January 2021, respondent-father's counsel filed a motion to continue the upcoming adjudicatory hearing on DSS's motion to terminate. In the motion, respondent-father's counsel explained that respondent-father's case manager had informed him

> that the federal penitentiary [where respondent-father was being held] was under lockdown due to COVID-19 until January 25, 2021 and no movement is permitted until that date. As such, [respondent-father] will not be available to call-in nor in any other way participate in the hearing scheduled for January 20, 2021.

At the adjudicatory hearing, the trial court heard from respondent-father's counsel in support of the motion, and from DSS and the guardian ad litem (GAL) in opposition. The trial court denied respondent-father's motion to continue the hearing. In a subsequent written order, the trial court explained:

> 3. That this motion to terminate parental rights was filed August 28, 2020 and initially scheduled for hearing on October 12, 2020. That hearing was continued at the request of the father's attorney and scheduled for December 16, 2020. That hearing was continued at no fault of anyone involved in this matter.
>
> 4. [Respondent-father's counsel] reports the lock down is scheduled to be lifted January 25, 2021. However, no one knows for sure how COVID-19 will continue to impact the prison system.
>
> 5. That hearings on motions to terminate parental rights are required to be heard within 90 days of

> filing. This case is already outside the required timeframe. The father and his attorney have had an extended period of time to prepare for this matter.
>
> 6. That the Respondent Father's attorney will be present at the hearing and permitted to cross exam witnesses and present evidence. That the father's report is admitted into evidence as well as his exhibits by the consent of the parties. These processes assure the due process rights of the father are being honored and the adversar[ial] nature of the proceeding is preserved.
>
> 7. The Respondent Father and the Alamance County Department of Social Services both have a commanding interest in this proceeding.
>
> 8. That due to the fundamental fairness of the process, representation of counsel for the father and other processes, the risk of error by not having the father present is low.

Based on these findings, the trial court concluded that the motion to continue should be denied because respondent-father's "due process and constitutional safeguards are being adequately observed and protected through the nature of these proceedings."

¶ 12 After denying respondent-father's motion to continue, the trial court conducted an adjudicatory hearing on DSS's motion to terminate respondent-father's parental rights. During the hearing, DSS presented testimony from a DSS social worker. Respondent-father's counsel presented testimony from Caleb's paternal grandfather, Larry, who stated that respondent-father had called him on the morning of the hearing because respondent-father had been "let . . . out" of lockdown for about thirty minutes. At the dispositional stage, the court heard testimony from Caleb's GAL. The trial court also considered a three-page report prepared by counsel which asserted that respondent-father had attained an "unblemished discipline history while incarcerated;" was "actively engaging in classes to better himself so that he can be a better parent to [Caleb];" and had "sent [Caleb] thirty-five dollars" and "two hand-made cards." In addition, the report further argued it was "not in [Caleb's] best interests for [respondent-father's] parental rights to be terminated." On the basis of this evidence, the trial court concluded that DSS had

proven the existence of all four grounds for termination and that terminating respondent-father's parental rights was in Caleb's best interests.

¶ 13 On 11 February 2021, respondent-father timely filed a notice of appeal pursuant to N.C.G.S. § 7B-1001(a1)(1).

II. Standard of review.

¶ 14 The standard of review utilized by an appellate court in reviewing a trial court's denial of a party's motion to continue varies depending on the reason the party sought the continuance. "Ordinarily, a motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review." *State v. Walls*, 342 N.C. 1, 24 (1995). "If, however, the motion is based on a right guaranteed by the Federal and State Constitutions, the motion presents a question of law and the order of the court is reviewable" de novo. *State v. Baldwin*, 276 N.C. 690, 698 (1970); *see also State v. Johnson*, 379 N.C. 629, 2021-NCSC-165, ¶ 16 ("Defendant's motion to continue raised a constitutional issue, requiring de novo review by this Court.").

¶ 15 "[A] parent enjoys a fundamental right 'to make decisions concerning the care, custody, and control' of his or her children under the Due Process Clause of the Fourteenth Amendment to the United States Constitution." *Adams v. Tessener*, 354 N.C. 57, 60 (2001) (quoting *Troxel v. Granville*, 530 U.S. 57, 66 (2000)). Accordingly, as noted above, "[w]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *In re Murphy*, 105 N.C. App. at 653 (quoting *Santosky*, 455 U.S. at 753–54). At an adjudicatory hearing, a respondent-parent must be afforded an adequate opportunity to present evidence "enabl[ing] the trial court to make an independent determination" regarding the facts pertinent to the termination motion. *In re T.N.H.*, 372 N.C. 403, 409 (2019). Thus, when a parent is unable to attend a termination hearing as a result of the trial court's refusal to grant a continuance, that parent's constitutional due process rights may be implicated.

¶ 16 Nonetheless, even if a motion to continue implicates a parent's constitutional parental rights, a reviewing court will only review a denial of the motion de novo if the respondent-parent "assert[ed] before the trial court that a continuance was necessary to protect a constitutional right." *In re S.M.*, 375 N.C. 673, 679 (2020). If the respondent-parent fails to assert a constitutional basis in support of his or her motion to continue, "that position is waived and we are constrained to review the trial court's denial of [a] motion to continue for abuse of discretion." *Id.* In

this case, the constitutional basis for respondent-father's motion to continue was apparent from the motion itself, in which respondent-father's counsel expressly argued that

> the proper administration of justice and any reasonable understanding of due process demands [respondent-father's] presence at this hearing to determine if the state will strip him of his constitutionally protected parental rights. [Respondent-father] has a fundamental right to participate in the state's efforts to deny him his constitutional rights to care for his child. [Respondent-father] strenuously objects to the state's efforts to terminate his parental rights over his minor child. In order to defend his rights [respondent-father] will testify at this hearing. This will be an impossibility if a continuance is not granted.

Accordingly, we review the trial court's denial of respondent-father's motion to continue the termination hearing de novo.

III. Analysis.

¶ 17 To establish that a termination order entered after a trial court has denied a motion to continue should be overturned, a respondent-parent must "show[ ] both that the denial was erroneous, and that [the respondent-parent] suffered prejudice as a result of the error." *In re A.L.S.*, 374 N.C. 515, 517 (2020) (quoting *Walls*, 342 N.C. at 24–25). In support of their assertion that the trial court did not err, DSS and the GAL echo two justifications the trial court relied upon in support of its denial of respondent-father's request for a continuance. First, they argue that the trial court did not err in denying the motion because "the matter was outside of the [ninety]-day statutory period, with two continuances having already been granted, one of which was requested by respondent[-]father's attorney." Second, they argue that the trial court did not err in denying the motion because the court appropriately "weighed and balanced the rights and interest[s] of all involved, assuring the father's due process rights were secured" by conducting the hearing in a manner that "preserved the adversarial nature of the proceedings and assured the father had more than adequate representation." With respect to prejudice, they argue that respondent-father has failed to demonstrate that his testimony "would have presented any evidence not already provided to the court," especially given that respondent-father's rights "were protected by counsel." We address each argument in turn.

A. The trial court erred to the extent it determined that the lockdown at respondent-father's detention facility was not an "extraordinary circumstance[ ]" within the meaning of the Juvenile Code.

¶ 18 Under North Carolina's Juvenile Code, a trial court may continue an adjudicatory hearing on a motion or petition to terminate a parent's parental rights for up to ninety days "for good cause shown." N.C.G.S. § 7B-1109(d) (2021). A trial court may also continue an adjudicatory hearing to a date more than ninety days past the date the motion or petition was filed, but "[c]ontinuances that extend beyond 90 days after the initial petition shall be granted only in *extraordinary circumstances* when necessary for the proper administration of justice." *Id.* (emphasis added). In this case, when respondent-father filed the motion to continue at issue on appeal, more than ninety days had already passed since DSS initially filed its termination motion. Indeed, the trial court had already determined that "extraordinary circumstances" justified continuing two previously scheduled adjudicatory hearings beyond the statutory ninety-day period: first, when respondent-father's counsel noted a scheduling conflict, and second, when then-Chief Justice Beasley renewed a COVID-19 Emergency Directive.

¶ 19 The trial court did not expressly state that respondent-father's motion failed to present an "extraordinary circumstance[ ]" within the meaning of N.C.G.S. § 7B-1109(d). But the trial court did refer to this statutory requirement in noting that "[t]his case is already outside the required timeframe." Still, even if it is correct that a trial court should consider the overall amount of time that has elapsed when ruling on a motion to continue filed more than ninety days after the filing of a termination motion, a trial court is not entitled to ignore the nature of the circumstances presented in support of the continuance motion. "Extraordinary circumstances" may occur both within and beyond ninety days after the filing of a termination motion or petition.

¶ 20 Here, the trial court had previously concluded that a disruption caused by the COVID-19 pandemic was an "extraordinary circumstance[ ]" permitting it to exercise its authority to grant a continuance pursuant to N.C.G.S. § 7B-1109(d). Logically, another disruption caused by the COVID-19 pandemic, one which precluded respondent-father from attending the adjudicatory hearing, was also an "extraordinary circumstance[ ]" permitting the trial court to exercise its authority to grant a continuance pursuant to N.C.G.S. § 7B-1109(d). While the trial court was certainly correct in noting that "no one knows for sure how COVID-19 will continue to impact the prison system," the fact that the court was

confronted with an unprecedented and rapidly evolving situation supports rather than detracts from the conclusion that respondent-father's motion presented an "extraordinary circumstance[ ]" within the meaning of N.C.G.S. § 7B-1109(d).

¶ 21 This conclusion does not necessarily mean that the trial court reversibly erred in denying respondent-father's motion to continue. As previously noted, determining that a motion to continue presents an "extraordinary circumstance[ ]" does not *require* a trial court to continue the hearing under N.C.G.S. § 7B-1109(d). But our conclusion that respondent-father's motion to continue did present an "extraordinary circumstance[ ]" does foreclose upon the argument that the trial court necessarily could not have erred because it lacked the authority to continue an adjudicatory hearing beyond ninety days under our Juvenile Code. Accordingly, we reject the contention that the trial court properly denied respondent-father's motion because the lockdown at his prison occasioned by the COVID-19 pandemic was not an "extraordinary circumstance[ ]" within the meaning of N.C.G.S. § 7B-1109(d).

B. The adjudicatory hearing held in respondent-father's absence did not meet the requirements of due process.

¶ 22 We next consider whether the trial court's decision to deny respondent-father's motion to continue the adjudicatory hearing violated respondent-father's due process rights. As explained above, the Due Process Clause of the United States Constitution requires the State to "provide [ ] parents with fundamentally fair procedures" when seeking to terminate their parental rights. *In re Murphy*, 105 N.C. App. at 653 (quoting *Santosky*, 455 U.S. at 754). The requirements of due process are "flexible and call[ ] for such procedural protections as the particular situation demands." *Jones v. Keller*, 364 N.C. 249, 256 (2010) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). When assessing whether the requirements of due process have been met, courts consider "the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." *Santosky*, 455 U.S. at 754 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

¶ 23 It is indisputable that respondent-father has a "commanding" interest "in the accuracy and justice of the decision to terminate his [ ] parental status." *Lassiter v. Dep't of Soc. Servs. of Durham Cty.*, N.C., 452 U.S. 18, 27 (1981); *see also Price v. Howard*, 346 N.C. 68, 79 (1997) (recognizing "[a] natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child"). This

interest "weighs against the respondent's absence from the adjudicatory hearing." *In re Murphy*, 105 N.C. App. at 654. At the same time, it is indisputable that DSS possessed an "equally commanding" interest in the outcome of the proceeding. *Id.* at 655.

¶ 24 To be clear, the "countervailing government interest" at stake here was *not* an interest in rapidly terminating respondent-father's parental rights to facilitate Caleb's adoption. *Id.* Rather, DSS's interest was in protecting Caleb's welfare through a proceeding that reaches "a correct decision" regarding whether respondent-father's parental rights could and should be terminated. *Id.* While it may be the case that terminating respondent-father's parental rights was both legally permissible and in Caleb's best interest, neither proposition could be assumed; the reason a trial court conducts an adjudicatory hearing is to determine if grounds exist to lawfully terminate a parent's parental rights, and one of the purposes of the procedures created by our Juvenile Code is to "prevent [ ] the unnecessary or inappropriate separation of juveniles from their parents." N.C.G.S. § 7B-100(4) (2021); *cf. In re A.C.F.*, 176 N.C. App. 520, 527 (2006) (recognizing "the State's interests in preserving the family" of a child whose parents are subject to termination proceedings). The State's interest in this proceeding necessarily partially overlapped with respondent-father's interest, in that both had a commanding interest in ensuring that the adjudicatory hearing helped the trial court reach the correct disposition of DSS's motion to terminate respondent-father's parental rights. *See In re K.M.W.*, 376 N.C. 195, 208 (2020) (recognizing that "fundamentally fair procedures" are "an inherent part of the State's efforts to protect the best interests of the affected children by preventing unnecessary interference with the parent-child relationship").

¶ 25 Because the parties largely agree that all parties to the adjudicatory hearing possessed a substantial interest in its outcome, "determination of whether respondent's federal due process rights have been violated turns upon the second *Eldridge* factor, risk of error created by the State's procedure." *In re Murphy*, 105 N.C. App. at 655. Respondent-father argues that his absence significantly increased the risk of an erroneous termination of his parental rights because (1) he was deprived of the opportunity to testify regarding topics central to the resolution of DSS's termination motion, and (2) his counsel did not have the opportunity to obtain the information about which respondent-father would have testified to at the hearing given that respondent-father was in lockdown for weeks preceding the hearing. In response, DSS and the GAL contend that the risk of error was minimal because respondent-father was represented by counsel and the trial court admitted into evidence a report

summarizing respondent-father's conduct while in prison. Although it is well established that "an incarcerated parent does not have an absolute right to be transported to a termination of parental rights hearing in order that he [or she] may be present under either statutory or constitutional law," *id.* at 652–53, we conclude that respondent-father's absence created a meaningful risk of error that undermined the fundamental fairness of this adjudicatory hearing.

¶ 26 The crux of DSS's termination motion—and the central factual basis for the trial court's termination order—was respondent-father's conduct while in prison. Each of the grounds asserted by DSS required an assessment of his conduct in light of the constraints imposed by his incarceration. Naturally, respondent-father possessed firsthand information regarding his conduct in prison that would have been relevant to the trial court's adjudication of these asserted grounds. This information included the availability of programs and services in his detention facility addressing the various components of his case plan, the effects of the COVID-19 pandemic on the availability of those programs, his efforts to avail himself of any existing programs and services during the time he was not a party to Caleb's juvenile proceeding, the progress he has made while enrolled in any programs or services, and his personal financial situation. The trial court needed this information to ensure that its adjudication was based on the specific facts of respondent-father's conduct in prison, as opposed to facts necessarily attendant to the fact of respondent-father's incarceration in general. *Cf. In re A.G.D.*, 374 N.C. 317, 327 (2020) ("[T]he fact of incarceration is neither a sword nor a shield for purposes of a termination of parental rights proceeding."). Denying respondent-father's motion to continue deprived the court of a crucial source of information about a topic central to the court's resolution of the termination motion.

¶ 27 The presence of counsel representing respondent-father may have partially mitigated the unfairness of proceeding without respondent-father's participation. Counsel's representation ensured that someone would be at the adjudicatory hearing to advocate on respondent-father's behalf. Yet under the circumstances of this case, counsel's presence did not obviate the risk of error created by respondent-father's absence. Counsel was severely limited in his ability to elicit up-to-date information from respondent-father at or near the time of the hearing because respondent-father was incarcerated in West Virginia in a facility under COVID-19 lockdown. Indeed, when respondent-father's counsel e-mailed a prison official to schedule a meeting with respondent-father to prepare for the adjudicatory hearing, the official responded that

respondent-father could not be made available for a meeting because the facility was under "lock down until Jan 25. No movement is available until then[.]"

¶ 28 Furthermore, while respondent-father's counsel did submit a report to the trial court containing a summary of respondent-father's conduct while in prison, the report was admitted "so [respondent-father's] wishes will be known today," not to provide factual information rebutting the allegations DSS made in support of its termination motion. In addition, because respondent-father's counsel was unable to meet with respondent-father before the hearing, it is unclear whether the report provided up-to-date information regarding respondent-father's conduct in prison. Accordingly, even with the report, counsel could not adequately bridge the informational gaps created when respondent-father was unable to testify at the adjudicatory hearing.

¶ 29 The facts of this case stand in stark contrast to the facts of *In re Murphy*, upon which both DSS and the GAL rely. In *In re Murphy*, "respondent's attorney did not argue that his client would be able to testify concerning any defense to termination," and counsel "could point to no reason that the respondent should be transported to the hearing other than for respondent to contest his sexual assault convictions, an impermissible reason." 105 N.C. App. at 655. Denying the respondent-parent the opportunity to testify in that case did not deprive the court of any information relevant to the disposition of any legal claims. In addition, because the respondent-father in *In re Murphy* was incarcerated "[a]s the result of his being convicted of sexual offenses he committed against his own children," the Court of Appeals reasoned that "[r]espondent's presence at the hearing combined with his parental position of authority over his children may well have intimidated his children and influenced their answers if they had been called to testify." *Id.* Allowing the respondent-parent to be present would have *exacerbated* the risk of error. By contrast, in this case respondent-father possessed information relevant to the legal question before the trial court, and there is no reason to believe that respondent-father's presence at the adjudicatory hearing would have interfered with the trial court's efforts to elicit truthful and candid testimony from other witnesses.

¶ 30 Under a different set of circumstances, the risk of error created by a respondent-parent's absence from an adjudicatory hearing might be outweighed by the State's interest in ensuring the efficient and orderly attainment of permanency for a juvenile. The State has a compelling interest in protecting a juvenile's welfare, and this interest both demands and justifies adherence to an expeditious process for determining when

a natural parent's rights should be terminated. *Cf. In re D.L.H.*, 364 N.C. 214, 219 n.2 (2010) (noting in a juvenile delinquency matter that "the mandates of [a provision of the Juvenile Code] . . . encourage expeditious handling of juvenile matters"). But, under these circumstances, this interest was not meaningfully implicated by respondent-father's motion to continue the adjudicatory hearing. Respondent-father did not ask for an indefinite continuance, nor did he ask for a continuance until the end of the COVID-19 pandemic, whenever that may be. He asked to continue a hearing calendared for 20 January 2021 until some date after 25 January 2021 because the lockdown at his prison was scheduled to be lifted at that time. Under these circumstances, "[t]he State's interest in prompt resolution of [termination] proceedings would not have been significantly affected by a brief continuance." *In re K.D.L.*, 176 N.C. App. 261, 265 (2006).

¶ 31 Similarly, under a different set of circumstances, the risk of error created by a respondent-parent's absence from an adjudicatory hearing might be negated by the presence of other witnesses who could provide the court with the same information the parent possesses. A trial court is required to "receive *some* oral testimony at the [adjudicatory] hearing," *In re T.N.H.*, 372 N.C. at 410 (emphasis added), but there is no requirement that the respondent-parent himself or herself be its source. Thus, in this case, had the trial court received testimony from a prison official or some other individual who could speak directly to respondent-father's conduct in prison, the presence of counsel might have adequately protected respondent-father's interest in avoiding an erroneous termination of his parental rights. *Cf. In re Barkley*, 61 N.C. App. 267, 270 (1983) (concluding that the trial court did not err by excluding a respondent-mother from the courtroom because her counsel was allowed to cross-examine a different witness possessing the same relevant substantive information). But no witness who could compensate for the informational deficiency created by respondent-father's absence was available at this adjudicatory hearing.

¶ 32 Procedural due process "is a flexible, not fixed, concept governed by the unique circumstances and characteristics of the interest sought to be protected." *Peace v. Emp. Sec. Comm'n of N. Carolina*, 349 N.C. 315, 323 (1998). The procedure necessary "to [e]nsure fundamental fairness" will vary given the particular context of each case. *State v. Tolley*, 290 N.C. 349, 364 (1976) (cleaned up); *cf. In re D.W.*, 202 N.C. App. 624, 628 (2010) ("[A] case-by-case analysis is more appropriate than the application of rigid rules."). In this case the trial court's denial of respondent-father's motion for a brief continuance,

which prevented respondent-father from testifying at a hearing where his parental rights were adjudicated, undermined the fairness of that hearing. Given respondent-father's inability to meet with counsel before the hearing because of the lockdown at his prison, the lack of any other testimony regarding respondent-father's conduct in prison, the centrality of factual questions regarding respondent-father's activities in prison to the court's examination of the asserted grounds for termination, and the magnitude of respondent-father's interest in avoiding an erroneous termination of his parental rights (which DSS shared), the trial court's denial of respondent-father's motion to continue was legal error.

C. Respondent-father was prejudiced by the trial court's erroneous denial of his motion to continue the adjudicatory hearing.

¶ 33 Furthermore, we agree with respondent-father that he was prejudiced by the trial court's denial of his motion to continue the adjudicatory hearing. Although it is correct that reversal is warranted only upon a showing of prejudice "whether the motion raises a constitutional issue or not," *Walls*, 342 N.C. at 24, our prejudice analysis is different when the trial court commits a constitutional error. When the trial court's denial of a respondent-parent's motion to continue violates that parent's due process rights, the "harmless error" standard applies: specifically, the challenged order must be overturned unless "the error was harmless beyond a reasonable doubt," and DSS bears the "burden" of proving that the error was harmless. *State v. Scott*, 377 N.C. 199, 2021-NCSC-41, ¶ 10; *cf. In re T.D.W.*, 203 N.C. App. 539, 545 (2010) (applying harmless error analysis to a due process violation in termination of parental rights context). Under these circumstances, we are unpersuaded that the trial court's denial of respondent-father's motion to continue the adjudicatory hearing was harmless beyond a reasonable doubt.

¶ 34 In general, to demonstrate prejudice resulting from the denial of a motion to continue an adjudicatory hearing, a respondent-parent should indicate what the parent's "expected testimony" will address and "demonstrate its significance" to the trial court's adjudication of the grounds for termination. *In re A.L.S.*, 374 N.C. at 518. The "better practice [is] to support a motion for continuance with" an "affidavit or other offer of proof." *Id.* (citing and quoting *State v. Cody*, 135 N.C. App. 722, 726 (1999)). Respondent-father's counsel did not submit an affidavit or other offer of proof in support of the continuance motion here. Yet respondent-father's counsel had no means of eliciting the information necessary to support such an affidavit or other offer of proof—counsel's inability to contact respondent-father and arrange for his testimony

at the hearing because of circumstances beyond the control of either of them was a principal justification for seeking the continuance.[3] Trial counsel did state that respondent-father "is standing behind testifying before the [c]ourt" and that he would "vociferously refute the . . . position to terminate [his] parental rights." In addition, in a brief to this Court, appellate counsel described the information respondent-father would have provided had he been permitted to testify. Accordingly, in assessing prejudice, we consider these arguments regarding the consequences of the trial court's refusal to grant a continuance.

¶ 35 As the Court of Appeals has correctly observed, although parents do not have an absolute right to be present and testify at a hearing where their parental rights are being adjudicated, "[g]enerally, we consider the testimony of a parent to be a vital source of information regarding the nature of the parent/child relationship and the necessity of terminating parental rights." *In re D.W.*, 202 N.C. App. at 629. Parental testimony is especially vital when it addresses facts that are central to the trial court's adjudication of asserted grounds for termination and when no other witness is available who can accurately convey to the court the information the parent possesses.

¶ 36 Here, the trial court's decision to terminate respondent-father's parental rights necessarily depended upon its assessment of respondent-father's conduct within the context of his case plan and the constraints of his incarceration. Every ground asserted by DSS and found by the trial court required careful parsing of these facts to ensure that respondent-father's parental rights were being terminated because of his conduct, not because of his incarceration. *Cf. In re K.N.*, 373 N.C. 274, 283 (2020) ("[R]espondent's incarceration, by itself, cannot serve as clear, cogent, and convincing evidence of neglect. Instead, the extent to which a parent's incarceration or violation of the terms and conditions

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3. DSS argues that it is "disconcerting" that respondent-father called his own father on "the morning of the termination hearing . . . but did not take the initiative to call his attorney." Although the transcript of the adjudicatory hearing does indicate that respondent-father spoke with his own father on the morning of the hearing, there is no evidence in the record suggesting respondent-father had the means or opportunity to appear at the adjudicatory hearing or otherwise meaningfully participate in preparing for the hearing with his attorney. As noted above, when respondent-father's counsel attempted to contact respondent-father at his detention facility, a prison official told counsel that any such contact would be impossible due to the lockdown. Even respondent-father's father's testimony supports the conclusion that the lockdown significantly inhibited efforts to communicate with respondent-father—according to the testimony, respondent-father was only able to call his father during a brief window when he was released from lockdown earlier that morning.

of probation support a finding of neglect depends upon an analysis of the relevant facts and circumstances, including the length of the parent's incarceration."). Respondent-father asserts that he would have testified to "the fitness of *all* appropriate caregivers" he identified as alternative placements for Caleb, "[e]vidence of [his] ability and efforts to work toward reunification with Caleb when he was not a party to the case," "[e]vidence of [his] ability to pay a reasonable portion toward Caleb's cost of care in the six months preceding the filing of the termination motion," "[e]vidence of [his] progress in the rehabilitative programs he was taking in prison to the date of the termination hearing," and "updated evidence about his release date." No other witness was present who could supply the court with this factual information.

¶ 37 The absence of information regarding respondent-father's conduct while in prison plainly had a "possible impact upon the actual hearing or the ensuing order by the trial court." *In re T.H.T.*, 362 N.C. 446, 453 (2008). DSS and the GAL have not met their burden of proving beyond a reasonable doubt that the trial court's violation of respondent-father's due process rights was harmless. Accordingly, respondent-father was prejudiced when he was denied the opportunity to be heard at the adjudicatory hearing "in a meaningful manner." *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

IV. Conclusion.

¶ 38 In this case, respondent-father was unable to attend the hearing during which his parental rights were adjudicated because the prison in which he was living was under lockdown due to the COVID-19 pandemic. He requested a brief continuance until the lockdown was lifted to enable him to prepare for the hearing with his attorney and to testify on his own behalf. The grounds for terminating respondent-father's parental rights all required the trial court to carefully assess his conduct while in prison. No other witness with direct knowledge of that information was available to testify at the hearing. Ultimately, the trial court terminated respondent-father's parental rights.

¶ 39 The purpose of an adjudicatory hearing is to determine whether the State's interest in protecting the welfare of a child requires displacing a parent's "constitutionally[ ] protected paramount right . . . to custody, care, and control of [his or her] children." *Owenby*, 357 N.C. at 145 (quoting *Petersen v. Rogers*, 337 N.C. 397, 403–04 (1994). That right "is a 'fundamental liberty interest' which warrants due process protection." *In re Montgomery*, 311 N.C. 101, 106 (1984) (quoting *Santosky*, 455 U.S. at 759). By denying respondent-father's motion to continue the

adjudicatory hearing, the trial court violated respondent-father's due process rights and undermined the fundamental fairness of the hearing. Accordingly, we vacate the order terminating respondent-father's parental rights and remand this case to the trial court for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

Chief Justice NEWBY dissenting.

¶ 40 The task here is to determine whether the trial court erred in terminating respondent-father's parental rights. Respondent presents two bases for why the trial court's order should be vacated. He first argues that the trial court's denial of his motion to continue the termination of parental rights (TPR) hearing violated his right to due process because he was unable to attend the hearing virtually. Additionally, respondent contends that sufficient grounds did not exist for the trial court to terminate his parental rights under N.C.G.S. § 7B-1111(a)(1), (2), (3), or (6). In order for respondent to prevail on appeal, however, he must establish that if he were virtually present at the hearing, the trial court would not have terminated his parental rights under *any* of the alleged grounds. Here respondent is unable to show that but for his absence, the trial court would not have terminated his parental rights for willful failure to pay a reasonable portion of Caleb's cost of care for the six-month period immediately preceding the filing of the TPR motion. *See* N.C.G.S. § 7B-1111(a)(3) (2021). Thus, he cannot prevail on appeal. The trial court's order terminating respondent's parental rights should be affirmed. I respectfully dissent.

¶ 41 On 28 August 2020, the Alamance County Department of Social Services (DSS) filed a motion to terminate respondent's parental rights to Caleb based, *inter alia*, upon respondent's willful failure to pay a reasonable portion of Caleb's cost of care pursuant to N.C.G.S. § 7B-1111(a)(3). Notably, during the relevant six-month period preceding the filing of the TPR motion, respondent contributed zero dollars toward Caleb's cost of care despite being employed in the dining room of the prison facility where he was incarcerated and receiving funds from his family. A hearing on the TPR motion was originally scheduled for 21 October 2020 but continued to 16 December 2020 and again continued to 20 January 2021.

¶ 42 On 12 January 2021, respondent moved to continue the TPR hearing for a third time, arguing he would otherwise be unable to attend the

hearing virtually due to a COVID-19 lockdown at the prison. In respondent's motion to continue, he argued that "due process demands [his] presence at th[e] hearing to determine if the state will strip him of his constitutionally protected parental rights." Respondent further contended that denying the requested continuance would render him unable to testify and thus unable to defend his constitutional right to care for his child. The trial court made the following findings with respect to respondent's motion:

> 2. That at the call of the hearing, [respondent's counsel] was heard on his written motion to continue the hearing on termination of parental rights. He indicated to the court that [respondent] could not attend the hearing due to the prison being on lock down due to the COVID-19 pandemic.
>
> 3. That this motion to terminate parental rights was filed August 28, 2020 and initially scheduled for hearing on October [21], 2020. That hearing was continued at the request of [respondent's] attorney and scheduled for December 16, 2020. That hearing was continued at no fault of anyone involved in this matter.
>
> 4. [Respondent's counsel] reports the lock down is scheduled to be lifted January 25, 2021. However, no one knows for sure how COVID-19 will continue to impact the prison system.
>
> 5. That hearings on motions to terminate parental rights are required to be heard within 90 days of filing. This case is already outside the required timeframe. [Respondent] and his attorney have had an extended period of time to prepare for this matter.
>
> 6. That [respondent's] attorney will be present at the hearing and permitted to cross exam[ine] witnesses and present evidence. That [respondent's] report is admitted into evidence as well as his exhibits by the consent of the parties. These processes assure the due process rights of [respondent] are being honored and the adversary nature of the proceeding is preserved.

7. [Respondent] and [DSS] both have a commanding interest in this proceeding.

8. That due to the fundamental fairness of the process, representation of counsel for [respondent] and other processes, the risk of error by not having [respondent] present is low.

The trial court denied respondent's motion. After the hearing on 20 January 2021, the trial court determined that grounds existed to terminate respondent's parental rights based upon neglect, willfully leaving Caleb in foster care or placement outside the home without correcting the conditions which led to his removal, willfully failing to pay a reasonable portion of the cost of Caleb's care, and dependency. *See* N.C.G.S. § 7B-1111(a)(1), (2), (3), (6).

¶ 43 On direct appeal before this Court, respondent now argues the trial court violated his right to due process when it denied his motion to continue the TPR hearing because it rendered him unable to testify at the hearing. Even assuming, without deciding, that the trial court erred in denying respondent's motion, respondent cannot prevail on appeal because he cannot show that he was prejudiced by such an error.[1]

¶ 44 " 'When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures,' which meet the rigors of the due process clause." *In re Murphy*, 105 N.C. App. 651, 653, 414 S.E.2d 396, 397 (quoting *Santosky v. Kramer*, 455 U.S. 745, 753–54, 102 S. Ct. 1388, 1394 (1982)), *aff'd per curiam*, 332 N.C. 663, 422 S.E.2d 577 (1992). Nonetheless, an incarcerated parent does not have an absolute right to be present at a TPR hearing. *In re Murphy*, 105 N.C. App. at 652–53, 414 S.E.2d at 397. As such, "[w]hen . . . a parent is absent from a termination proceeding and the trial court preserves the adversarial nature of the proceeding by allowing the parent's counsel to cross examine witnesses, with the questions and answers being recorded, the parent must demonstrate some actual prejudice in order to prevail upon appeal." *Id.* at 658, 414 S.E.2d at 400. In other words, a respondent must show that "there is a reasonable probability that, but for [his absence], there would have been a different result in the proceedings." *In re T.N.C.*, 375 N.C. 849, 854, 851 S.E.2d 29, 33 (2020) (quoting *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 248 (1985)).

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1. The analysis required to determine prejudice is comparable to that required by the second *Eldridge* factor—i.e., the risk of error caused by respondent's absence. Because this Court should decide this case under the prejudice analysis, an analysis of the *Eldridge* factors is unnecessary.

¶ 45 Here the trial court preserved the adversarial nature of the proceedings because respondent was represented by counsel, who presented evidence, called a witness, and cross-examined witnesses at the TPR hearing. Though "a finding of only one ground is necessary to support a termination of parental rights," *In re A.R.A.*, 373 N.C. 190, 194, 835 S.E.2d 417, 421 (2019), the trial court found that grounds existed to terminate respondent's parental rights under N.C.G.S. § 7B-1111(a)(1), (2), (3), and (6). Therefore, to prevail on appeal, respondent must show that if he were permitted to testify at the hearing, the trial court would not have terminated his parental rights based upon *any* of the above grounds.

¶ 46 Respondent's presence at the hearing would not have changed the trial court's adjudication under N.C.G.S. § 7B-1111(a)(3). A trial court may terminate a parent's parental rights under this ground when

> [t]he juvenile has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent has for a continuous period of six months immediately preceding the filing of the petition or motion willfully failed to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

N.C.G.S. § 7B-1111(a)(3). We have recently explained that termination under N.C.G.S. § 7B-1111(a)(3) is proper "where the trial court finds that the respondent has made no contributions to the juvenile's care for the period of six months immediately preceding the filing of the petition and that the respondent had income during this period." *In re J.E.E.R.*, 378 N.C. 23, 2021-NCSC-74, ¶ 18.

¶ 47 Here the trial court found that

> 13. [Respondent] entered into the Alamance County Jail on May 21, 2018 and has not left incarceration since that date.
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> . . . .
>
> 16. The juvenile has been alive 726 days. Out of these 726 days, he has been in DSS custody 725 days. He has never lived with [respondent].
>
> . . . .
>
> 46. [Respondent] receives financial assistance while incarcerated from his mother and other

> family members/friends. He also works within the prison and receives a small amount of pay.
>
> 47. [DSS] has expended over $10,000.00 for the cost of care of the juvenile.
>
> 48. The petition to terminate parental rights was filed August 28, 2020. The relevant six month period for determination if [respondent] has paid his reasonable portion of the cost of care is from February 28, 2020 until August 28, 2020. During that period of time, [respondent] paid zero dollars towards the cost of care for the juvenile.
>
> 49. [Respondent] has the ability to pay more than zero towards the cost of care for the juvenile, as demonstrated by the money he provided in September of 2020, and has willfully failed to pay such.

¶ 48 Respondent challenges finding of fact 49, arguing the record does not support any finding that he had the ability to pay an amount greater than zero dollars toward Caleb's cost of care during the relevant period. The record, however, includes two individualized needs plans for respondent, which indicate that respondent was employed in the dining room of the prison facility at least from 12 November 2019 to 22 July 2020, almost the entirety of the relevant six-month period. Moreover, Christy Roessler, a DSS social worker, testified that respondent had access to money to help with Caleb's cost of care because respondent was being paid for his work at the prison and was receiving funds from his family. Though respondent sent thirty-five dollars to Caleb on 9 September 2020, demonstrating his ability to pay some amount, he paid nothing during the relevant six-month period. Therefore, the trial court's finding that respondent had the ability to pay more than zero dollars during the relevant period is supported by the record evidence. Since respondent made no contributions to the cost of Caleb's care during the relevant period despite having some income, the trial court properly terminated his parental rights pursuant to N.C.G.S. § 7B-1111(a)(3).

¶ 49 The majority states that the trial court was required to consider "up-to-date" testimony from respondent regarding his good behavior in prison. According to the majority,

> the trial court's decision to terminate respondent-father's parental rights necessarily depended upon

> its assessment of respondent-father's conduct within the context of his case plan and the constraints of his incarceration. Every ground asserted by DSS and found by the trial court required careful parsing of these facts to ensure that respondent-father's parental rights were being terminated because of his conduct, not because of his incarceration.

As such, the majority erroneously concludes that respondent's absence "created a meaningful risk of error that undermined the fundamental fairness of this adjudicatory hearing" because the trial court was unable to consider relevant, up-to-date information regarding respondent's conduct in prison.

¶ 50 As explained above, however, the trial court's adjudication under N.C.G.S. § 7B-1111(a)(3) did not require an understanding of respondent's current conduct.[2] Rather, it merely required the trial court to find two facts: (1) that respondent had some income during the relevant period and thus the ability to pay something; and (2) that respondent contributed zero dollars toward Caleb's cost of care. Since the relevant period for adjudication under N.C.G.S. § 7B-1111(a)(3) consisted of the six months immediately preceding the filing of the TPR motion, the facts necessary to support termination under this ground were finalized on the date the TPR motion was filed. As such, the trial court did not need to hear "up-to-date" testimony from respondent about his subsequent good behavior in prison.

¶ 51 The majority is thus unable to articulate what evidence respondent's testimony would have offered that could have altered the trial court's adjudication under N.C.G.S. § 7B-1111(a)(3). Respondent presented no offer of proof before the trial court. On appeal, respondent also failed to specify any facts showing that he did not have income during the relevant period. Rather, respondent, and now the majority, merely asserts that respondent would have presented "[e]vidence of [his] ability to pay a reasonable portion toward Caleb's cost of care in the six months preceding the filing of the termination motion." What exactly such evidence is remains unknown. This conclusory assertion is not sufficient to show that respondent's testimony would have rendered a different result under N.C.G.S. § 7B-1111(a)(3). It is clear that respondent had income but

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2. Though respondent's conduct at the time of the hearing may have been relevant to adjudication of some of the other grounds alleged, his conduct after 28 August 2020 had no bearing on the trial court's N.C.G.S. § 7B-1111(a)(3) determination.

paid nothing. Notably, if contrary evidence existed, then respondent could have included it in his report, which was admitted into evidence.

¶ 52 The majority excuses respondent's counsel's failure to present an offer of proof by claiming that "[c]ounsel was severely limited in his ability to elicit up-to-date information from respondent-father at or near the time of the hearing because respondent-father was incarcerated in West Virginia in a facility under COVID-19 lockdown." However, all of the information needed to defend against the termination of respondent's parental rights under N.C.G.S. § 7B-1111(a)(3) had been available since the TPR motion was filed on 28 August 2020. Certainly, in preparing for the two previously scheduled TPR hearings in October and December of 2020, any relevant information would have been available to respondent's counsel. Therefore, the 145-day period between the filing of the TPR motion and the hearing, including the two scheduled hearings, provided respondent and his counsel sufficient time and incentive to prepare a defense to termination under N.C.G.S. § 7B-1111(a)(3).

¶ 53 Furthermore, the trial court found that

> [respondent] called [the paternal grandfather] before this hearing and they spoke for approximately thirty minutes. Although the federal penitentiary is on a COVID shutdown right now and would not allow [respondent] to participate in this hearing via WebEx, they do allow some telephone communication with the outside world. [Respondent] did not call his attorney during this time.

This finding is supported by the paternal grandfather's testimony that he spoke to respondent the morning of the TPR hearing for about thirty minutes. As such, it is binding on appeal. *See In re C.H.M.*, 371 N.C. 22, 28, 812 S.E.2d 804, 809 (2018) ("[A] trial court's findings of fact 'are conclusive on appeal if there is competent evidence to support them.' " (quoting *In re Skinner*, 370 N.C. 126, 139, 804 S.E.2d 449, 457 (2017))). Instead of calling the paternal grandfather on the morning of the TPR hearing, respondent could have called his counsel to prepare for the hearing. Therefore, the majority's contention that respondent's counsel was unable to sufficiently prepare for the hearing is without merit.

¶ 54 Moreover, the majority concludes that the COVID-19 lockdown constituted an "extraordinary circumstance" under N.C.G.S. § 7B-1109(d), which *required* the trial court to continue the hearing. *See* N.C.G.S. § 7B-1109(d) (2021). N.C.G.S. § 7B-1109(d), however, does not require

that a trial court grant a continuance but merely gives a trial court the authority to do so if it finds that extraordinary circumstances exist. *See State v. Phillip*, 261 N.C. 263, 266, 134 S.E.2d 386, 389 (1964) ("Ordinarily a motion for continuance is addressed to the sound discretion of the trial judge and his ruling thereon is not subject to review on appeal except in a case of manifest abuse."). Here the trial court acted within its discretion when it considered the circumstances surrounding the COVID-19 lockdown and determined that a continuance was not necessary.[3]

¶ 55 The trial court in the present case appropriately found that grounds existed to terminate respondent's parental rights under N.C.G.S. § 7B-1111(a)(3). Even if respondent testified regarding his "up-to-date" conduct while incarcerated, the trial court's adjudication under N.C.G.S. § 7B-1111(a)(3) would have remained the same. Respondent cannot show prejudice and thus cannot prevail on appeal. Since a finding of only one ground was necessary to support the trial court's TPR order, there is no need to address the remaining grounds. The trial court's order terminating respondent's parental rights should be affirmed. I respectfully dissent.

Justices BERGER and BARRINGER join in this dissenting opinion.

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3. In reaching a contrary conclusion, the majority gives weight to the fact that respondent only requested a five-day continuance. Unlike the trial court, however, the majority has no familiarity with the court calendar in Alamance County and thus cannot know when this case could have been rescheduled. Thus, such a consideration is better left to the sound discretion of the trial court.

IN RE J.N.

[381 N.C. 131, 2022-NCSC-52]

IN THE MATTER OF J.N. & L.N.

No. 132PA21

Filed 6 May 2022

Appeal and Error—preservation of issues—constitutional issue—child abuse and neglect proceeding

In an abuse and neglect proceeding, a father failed to preserve his constitutional argument that it was error for the trial court to grant guardianship to his children's grandparents without first concluding that the father was an unfit parent or had acted inconsistently with his constitutional right to parent. The father had ample notice that the department of social services was recommending that the permanent plan be changed from reunification to guardianship, he failed to make any argument that guardianship with the grandparents would be inappropriate on constitutional grounds, and the issue was not automatically preserved.

Justice EARLS concurring.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 276 N.C. App. 275, 2021-NCCOA-76, vacating and remanding an order entered on 8 January 2020 by Judge Lisa V. Menefee in District Court, Forsyth County. Heard in the Supreme Court on 22 March 2022.

Theresa A. Boucher for petitioner-appellee Forsyth County Department of Social Services.

Rosenwood, Rose & Litwak, PLLC, by Nancy S. Litwak, for appellee Guardian ad Litem.

Troy Shelton and R. Daniel Gibson for appellees juveniles' guardians.

Benjamin J. Kull for respondent-appellant father.

BERGER, Justice.

IN RE J.N.

[381 N.C. 131, 2022-NCSC-52]

¶ 1 Respondent-father petitioned the Court for discretionary review of a Court of Appeals decision vacating the trial court's permanency planning order and remanding the case for additional findings.[1] We affirm.

I. Background

¶ 2 On April 10, 2018, the Forsyth County Department of Social Services (DSS) filed juvenile petitions alleging that J.N. (Jimmy) was an abused and neglected juvenile and L.N. (Lola) was a neglected juvenile.[2] The trial court granted nonsecure custody to DSS on the same day. On May 8, 2019, the trial court adjudicated Jimmy to be an abused and neglected juvenile and Lola to be a neglected juvenile.

¶ 3 The trial court held a permanency planning hearing on September 9, 2019. At the hearing, DSS sought to change the primary plan from reunification to guardianship with an approved caregiver. Respondent's sole argument to the trial court was that reunification should remain the primary plan. Respondent did not argue or otherwise contend that the evidence failed to demonstrate he was an unfit parent or that his constitutionally-protected right to parent his children had been violated. As a result of the evidence presented at the hearing, the trial court granted guardianship of the children to the maternal grandparents. Respondent appealed.

¶ 4 In the Court of Appeals, respondent argued that the trial court erred in granting guardianship to the maternal grandparents without first finding that he was an unfit parent or he had acted inconsistently with his constitutional right to parent. In addition, respondent asserted that the trial court erred by failing to make required findings under N.C.G.S. § 7B-906.1(n) in the permanency planning order before ceasing further permanency planning review hearings.

¶ 5 On March 16, 2021, the Court of Appeals vacated the trial court's permanency planning order and remanded the case to the trial court for additional findings. *In re J.N. & L.N.*, 276 N.C. App. 275, 2021-NCCOA-76, ¶ 15. The Court of Appeals agreed with respondent that the trial court erred by failing to make necessary findings under N.C.G.S. § 7B-906.1(n). *Id.* ¶ 10. However, the Court of Appeals concluded that respondent had waived his argument that the trial court erred by granting guardianship without first concluding that respondent was an unfit parent or had acted inconsistently with his constitutional right to parent. *Id.* ¶ 9.

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1. The mother of the juveniles is deceased.

2. Pseudonyms are used to protect the identity of the juveniles and for ease of reading.

Respondent petitioned this Court for discretionary review, arguing that the Court of Appeals erred by holding that respondent failed to preserve his constitutional argument.

II. Analysis

¶ 6 Respondent contends that his constitutional argument is automatically preserved under N.C. R. App. P. 10(a)(1) by our holding in *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994). There, this Court stated that "the law presumes parents will perform their obligations to their children, [and] presumes their prior right to custody." *Id.* at 403, 445 S.E.2d at 904 (quoting *In re Hughes*, 254 N.C. 434, 436–37, 119 S.E.2d 189, 191 (1961)). "[A]bsent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail." *Id.* at 403–04, 445 S.E.2d at 905.

¶ 7 But the existence of a constitutional protection does not obviate the requirement that arguments rooted in the Constitution be preserved for appellate review. Our appellate courts have consistently found that unpreserved constitutional arguments are waived on appeal. *See State v. Lloyd*, 354 N.C. 76, 86–87, 552 S.E.2d 596, 607 (2001) ("Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal."); *State v. Fernandez*, 346 N.C. 1, 18, 484 S.E.2d 350, 361 (1997) (holding that defendant waived confrontation and due process arguments by not first raising the issues in the trial court); *Dep't of Transp. v. Haywood Oil Co.*, 195 N.C. App. 668, 677–78, 673 S.E.2d 712, 718 (2009) (holding that arguments pertaining to Fourteenth Amendment to the United States Constitution and law of the land clause of the North Carolina Constitution, although constitutional issues, were not raised before the trial court and therefore not properly preserved for appeal); *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39 (2002) ("It is well settled that an error, even one of constitutional magnitude, that [is not brought] to the trial court's attention is waived and will not be considered on appeal.").

¶ 8 Nothing in *Petersen* serves to negate our rules on the preservation of constitutional issues. Thus, a parent's argument concerning his or her paramount interest to the custody of his or her child, although afforded constitutional protection, may be waived on review if the issue is not first raised in the trial court.

¶ 9 Here, respondent failed to assert his constitutional argument in the trial court. Respondent was on notice that DSS and the guardian ad litem were recommending that the trial court change the primary permanent

plan in this case from reunification to guardianship. Prior to the hearing, DSS filed a court report in which it stated that reunification was not possible due to the minimal progress respondent had made and because respondent was unable to provide for the safety and well-being of Jimmy and Lola. DSS, therefore, recommended that guardianship be granted to the maternal grandparents. Further, the guardian ad litem also filed a court report recommending that guardianship be granted to the maternal grandparents. Moreover, during closing arguments at the hearing, the guardian ad litem attorney specifically stated, "Your Honor, at this point, we feel and would respectfully request that you allow guardianship to be given to [the maternal grandparents]."

¶ 10 In turn, respondent's argument focused on the reasons reunification would be a more appropriate plan. Despite having the opportunity to argue or otherwise assert that awarding guardianship to the maternal grandparents would be inappropriate on constitutional grounds, respondent failed to do so. Therefore, respondent waived the argument for appellate review.

III. Conclusion

¶ 11 The Court of Appeals did not err in concluding that respondent waived his constitutional argument by not first raising the issue before the trial court.

AFFIRMED.

Justice EARLS concurring.

¶ 12 I concur with the majority that in the context of an abuse and neglect proceeding in juvenile court, the potential issue that a trial court's order may infringe upon a parent's constitutional right under the substantive Due Process Clause of the Fourteenth Amendment to the custody, care, and control of their child is subject to the general rule that the issue must first be raised by the parent in the trial court. *See*, *e.g.*, *State v. Creason*, 313 N.C. 122, 127 (1985) (explaining that the Court is not required to rule on a constitutional issue that was not raised and determined in the trial court). At the same time, nothing in the Court's decision today in any way compromises or negates the principles established in *Petersen v. Rogers*, 337 N.C. 397, 403–04 (1994), *Price v. Howard*, 346 N.C. 68, 79 (1997), *Adams v. Tessener*, 354 N.C. 57, 62 (2001), and *Owenby v. Young*, 357 N.C. 142, 148 (2003), that (1) a parent has a "constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child," *Price*, 346 N.C. at 79; (2) before awarding

custody of a parent's child to a nonparent, the trial court must first determine, based on clear and convincing evidence, that the natural parent has forfeited their constitutionally-protected status, *Owenby*, 357 N.C. at 148; and (3) a parent forfeits this paramount interest by either being unfit to have custody or when the parent's behavior "viewed cumulatively" has been inconsistent with the parent's constitutionally-protected parental status, *id*. Limited to the narrow facts of this case, we hold today that while a parent's rights are protected by "a constitutionally based presumption," *Routten v. Routten*, 374 N.C. 571, 576 (quoting *Routten v. Routten*, 262 N.C. App. 436, 459 (2018) (Inman, J., concurring in part)), *cert. denied*, 141 S. Ct. 958 (2020), *reh'g denied*, 141 S. Ct. 1456 (2021), when a child is already in the custody of a nonparent by valid court order, as in these juvenile court proceedings, a parent on notice that a court may enter a permanent order of guardianship must raise the objection that the constitutionally-required findings are not present in order to preserve that issue for appeal.[1]

¶ 13 As recent decisions illustrate, several propositions also follow from this conclusion. First, a parent must actually have an opportunity to make the argument in the court below. For example, if the procedural posture of the case is such that the Department of Social Services (DSS) has noticed a hearing to determine visitation and does not present any evidence that the parent is unfit or has acted inconsistently with their parental rights, but after the hearing the parent receives an order in which the trial court has imposed guardianship, the parent has had no chance to raise the constitutional issue before the trial court. *See*, *e.g.*, *In re R.P.*, 252 N.C. App. 301, 305 (2017) (holding that although a parent's right to findings regarding his or her constitutionally-protected status is waived if the parent does not raise the issue before the trial court, no waiver occurred when the parent was not afforded the opportunity to raise an objection at the permanency planning review hearing). In such

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1. While state statutory schemes are distinct, most other states that have addressed whether a parent waives constitutional arguments in these circumstances by not raising them below follow this rule. *See*, *e.g.*, *In re L.M.I.*, 119 S.W.3d 707, 710–11 (Tex. 2003) (holding that in termination of parental rights cases, constitutional due process rights must be raised in the trial court in order to be considered on appeal); *In re Doe*, 454 P.3d 1140, 1146 (Idaho 2019) (same); *In re Zanaya W.*, 291 Neb. 20, 31, 863 N.W.2d 803, 812 (2015) (holding that a trial court cannot be found to have committed error regarding an issue never presented to it for disposition). The states that do appear to allow parents to raise these issues for the first time on appeal hold that an appellate court has a duty to sua sponte consider violations of fundamental constitutional rights. *See*, *e.g.*, *In re S.S.*, 2004 OK CIV APP 33, ¶ 7, 90 P.3d 571, 574–75; *Monica C. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 89, ¶ 23, 118 P.3d 37, 42 (2005); *In re B.A.*, 2014 VT 76, 197 Vt. 169, 101 A.3d 168; *In re H.Q.*, 182 Wash. App. 541, 330 P.3d. 195, 200 (2014).

circumstances the parent has not waived their right to findings regarding their constitutional status because there was no opportunity to raise an objection at the hearing.

¶ 14 Second, there are no "magic words" such as "constitutionally-protected status as a parent" that must be uttered by counsel, nor is the parent's counsel required to object to certain evidence or specific findings of fact to preserve the constitutional issue. DSS may present evidence that a parent is unfit or otherwise has acted inconsistently with their constitutionally-protected status. Unless the parent presents no evidence and makes no arguments, the parent has raised the constitutional issue by responding to DSS's arguments. *See In re B.R.W.*, 2021-NCCOA-343, ¶ 40, *aff'd*, No. 310A21 (N.C. May 6, 2022).

¶ 15 Third, when a parent is on notice that the trial court is considering awarding guardianship to a nonparent and DSS has not offered evidence that the parent is unfit or has acted inconsistently with their constitutionally-protected status, the parent still must raise the constitutional issue in the trial court, and failure to do so constitutes a waiver. *See*, *e.g.*, *In re C.P.*, 258 N.C. App. 241, 246 (2018). The trial court must be on notice that the parent is contesting the loss of their constitutional rights and their arguments for why the evidence does not overcome that presumption. The trial court must then make the factual findings necessary to support its legal determination of whether the parent is unfit or has acted inconsistently with his or her constitutionally-protected parental status, with the burden of proof remaining with the petitioner. *See Price*, 346 N.C. at 84.

¶ 16 It remains the law in North Carolina that a trial court cannot proceed to evaluate the best interests of the child "[u]ntil, and unless, the [petitioner] establishes by clear and convincing evidence that a natural parent's behavior, viewed cumulatively, has been inconsistent with his or her protected status." *Owenby*, 357 N.C. at 148. Moreover, the "clear and convincing standard requires evidence that should fully convince." *In re I.K.*, 377 N.C. 417, 2021-NCSC-60, ¶ 19 (quoting *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 721 (2009)). "This burden is more exacting than the preponderance of the evidence standard[.]" *Id.* (quoting *Scarborough*, 363 N.C. at 721).

¶ 17 Finally, as a matter of issue preservation, it remains true that while "a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal[,]" *State v. Benson*, 323 N.C. 318, 322 (1988) (quoting *State v. Hunter*, 305 N.C. 106, 112 (1982)), this does not mean that constitutional issues may never be raised in the

first instance on appeal. As our rules explicitly recognize, some issues are deemed preserved by rule or law. *See* N.C. R. App. P. 10(a); N.C.G.S. § 15A-1446(d) (2021). Moreover, "[t]his Court may exercise its supervisory power to consider constitutional questions not properly raised in the trial court, but only in exceptional circumstances." *Anderson v. Assimos*, 356 N.C. 415, 416 (2002). Such exceptional circumstances are not present in this case. Therefore, I concur that the constitutional issues were not properly preserved for appeal.

IN THE MATTER OF K.Q.

No. 191A21

Filed 6 May 2022

Termination of Parental Rights—grounds for termination—neglect—likelihood of future neglect—pattern of domestic violence

In an order terminating respondent-father's parental rights to his four-year-old son on the ground of neglect (N.C.G.S. § 7B-1111(a)(1)), the trial court's determination that there was a likelihood of repetition of neglect if the child were returned to respondent's care was supported by unchallenged findings regarding the long history of domestic violence between respondent and the child's mother, respondent's violation of domestic violence protective orders, and respondent's aggression toward a social worker and display of a knife at a supervised visit. Although respondent made some progress on his case plan, his repeated denials that domestic violence occurred or that it was the reason for the child's removal gave rise to a justifiable concern about the possibility of future neglect.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from order entered on 3 March 2021 by Judge Cheri Siler Mack in District Court, Cumberland County. This matter was calendared in the Supreme Court on 18 March 2022 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Patrick A. Kuchyt for petitioner-appellee Cumberland County Department of Social Services.

IN RE K.Q.

[381 N.C. 137, 2022-NCSC-53]

Matthew D. Wunsche for Guardian ad Litem.

Mary McCullers Reece for respondent-appellant father.

HUDSON, Justice.

¶ 1 Respondent-father appeals from the trial court's order terminating his parental rights to his minor child K.Q. (Kenny).[1] Upon review, we affirm the trial court's order.[2]

I. Background

¶ 2 On 8 June 2018, Cumberland County Department of Social Services (DSS) filed a juvenile petition alleging four-year-old Kenny was neglected and dependent. The petition provided that DSS received a Child Protective Services (CPS) referral on 5 April 2018 concerning Kenny's safety after law enforcement was called to the parents' residence on 23 March 2018 in response to a physical altercation between the parents in Kenny's presence. The mother told law enforcement that respondent-father came at her with a knife and cut her, swung a baseball bat at her, threw her on the floor, and held her so she could not leave. Respondent-father was charged with assault on a female as a result of the incident.

¶ 3 DSS further alleged, and the record shows, that the mother filed a complaint and request for a domestic violence protective order (DVPO) based on the 23 March 2018 incident on 26 March 2018; respondent-father was arrested on 31 March 2018 for violating the DVPO; but the action was dismissed and the DVPO was dissolved on 13 April 2018 because the mother failed to appear in court and prosecute. Since that time, social workers had attempted home visits, left notices at the residence, and sent a certified letter to the parents informing them of the CPS report and requesting the parents contact the social workers. However, the social workers' efforts to confirm Kenny's wellbeing were unsuccessful. DSS reported that when a social worker went to the residence with law enforcement on 7 June 2018, respondent-father was present and "became belligerent and yelled and cursed at the social worker." Respondent-father told the social worker that the mother had

1. A pseudonym is used to protect the identity of the juvenile and for ease of reading.

2. The order also terminated the parental rights of Kenny's mother. The mother noticed an appeal from the termination order and a prior order ceasing reunification efforts, but her appeal was dismissed by order of this Court on 14 September 2021. Accordingly, this opinion concerns only respondent-father's appeal.

left and was in Charlotte, but he would not provide an address or phone number for the mother. DSS ultimately alleged in the petition that it believed the parents were living together; the mother had not contacted DSS; the social worker had not been able to see Kenny to determine his safety; Kenny was at risk of irreparable harm in the parents' custody; and DSS could not ensure his safety.

¶ 4 On the same day the petition was filed, the trial court entered an order granting DSS nonsecure custody of Kenny. However, Kenny was not immediately turned over to DSS because his and his mother's whereabouts were unknown. Kenny had still not been turned over to DSS when the matter came on for hearing on the need for continued nonsecure custody on 13 June 2018. Respondent-father appeared at the hearing and testified about the parents' CPS history and previous DVPOs in Mecklenburg County; but he denied the allegations in the instant petition, testified he did not want to turn Kenny over to DSS, and refused to provide the location of Kenny and the mother. The court continued the hearing until the following afternoon and ordered respondent-father to either produce Kenny by that time or reveal Kenny's exact location so DSS could take custody by that time. Kenny was turned over to DSS on 14 June 2018.

¶ 5 Respondent-father was initially allowed weekly supervised visitation with Kenny while DSS's nonsecure custody of Kenny continued. However, on 16 July 2018, DSS filed a "Motion for Review" seeking to cease respondent-father's visitation and contact with Kenny based on allegations that respondent-father had brought a knife to visitation; he became belligerent with the supervising social worker when the social worker ceased the visit due to his insistence on discussing the case in front of Kenny; he grabbed Kenny's arm after the visit had ceased; and he had to be escorted from the building by security. DSS also reported in the motion that respondent-father had left threatening messages for the mother and threatened to abscond with Kenny if the opportunity arose. The trial court immediately suspended respondent-father's visitation pending a full review hearing and prohibited contact with Kenny. Following a hearing on 20 August 2018, the trial court granted DSS's motion and ordered that respondent-father's visitation remain suspended until Kenny's therapist recommended that visitation resume. The court also ordered respondent-father to complete parenting and anger management classes.

¶ 6 Following an adjudication hearing on the juvenile petition on 29 and 30 November 2018, the trial court adjudicated Kenny neglected

and dependent.[3] In support of the adjudication, the trial court made findings about the long history of domestic violence between the parents, including findings about the 23 March 2018 domestic violence incident and DSS's ensuing intervention that were consistent with the allegations in the petition. The court also found that respondent-father had blamed Kenny for the mother's injuries from the 23 March 2018 incident and had told the mother to tell the court the same.

¶ 7 The matter came back before the trial court for the dispositional portion of the hearing on 12 February 2019. In a disposition order entered on 11 April 2019, the court found that respondent-father was attending counseling and anger management classes and had reported completing a psychological evaluation. The court also found that it had informed respondent-father of the need for continued compliance with his case plan. The court further found and concluded that Kenny's return to respondent-father custody at that time would be contrary to Kenny's health and safety, and that respondent-father was not a fit or proper person for the care, custody, and control of Kenny or for visitation until a therapeutic recommendation. Accordingly, the court ordered DSS to retain custody of Kenny. Respondent-father was ordered to complete age-appropriate parenting classes, participate in individual counseling, complete the Resolve Program to address domestic violence issues, complete a psychological evaluation, and maintain stable housing and employment. Respondent-father was not allowed visitation until it was recommended by Kenny's therapist.

¶ 8 At the initial permanency planning hearing on 11 April 2019, the trial court established a primary plan of reunification with the parents with a secondary plan of custody with a suitable person concurrent with adoption. However, following a permanency planning on 1 August 2019, the court changed the permanent plan for Kenny to adoption with secondary plans of custody with a suitable person and reunification with respondent-father. Then, following a permanency planning hearing on 12 December 2019, the court entered an order finding that despite respondent-father's participation in services, he continued to desire a relationship with the mother; DSS and the guardian ad litem were concerned that domestic violence remained an issue despite his participation in services; the mother had obtained a new DVPO against respondent-father on 29 October 2019; and respondent-father had new

3. The trial court entered an "Adjudication and Temporary Disposition Order" on 7 January 2019. A "Corrected Adjudication and Temporary Disposition Order" was later entered on 17 April 2019. This opinion relies on the corrected order.

criminal charges related to the mother. The court ordered DSS to proceed with filing a termination of parental rights action in pursuit of Kenny's primary permanent plan.

¶ 9 On 2 June 2020, DSS filed a motion to terminate respondent-father's parental rights on grounds of neglect pursuant to N.C.G.S. § 7B-1111(a)(1) (2021), willful failure to make reasonable progress pursuant to N.C.G.S. § 7B-1111(a)(2) (2021), and willful abandonment pursuant to N.C.G.S. § 7B-1111(a)(7) (2021). The termination motion was heard on 25 September and 6 October 2020. On 3 March 2021, the trial court entered an order terminating respondent-father's parental rights. The court concluded that grounds existed to terminate respondent-father's parental rights for neglect and willful failure to make reasonable progress, *see* N.C.G.S. § 7B-1111(a)(1)–(2), and that termination of his parental rights was in Kenny's best interests. Respondent-father appealed.

II. Analysis

¶ 10 Respondent-father challenges the trial court's adjudication of the existence of grounds to terminate his parental rights.

> When reviewing the trial court's adjudication of grounds for termination, we examine whether the court's findings of fact are supported by clear, cogent and convincing evidence and whether the findings support the conclusions of law. Any unchallenged findings are deemed supported by competent evidence and are binding on appeal. The trial court's conclusions of law are reviewed de novo.

In re Z.G.J., 378 N.C. 500, 2021-NCSC-102, ¶ 24 (cleaned up). "[A]n adjudication of any single ground in N.C.G.S. § 7B-1111(a) is sufficient to support a termination of parental rights." *In re E.H.P.*, 372 N.C. 388, 395 (2019).

¶ 11 A trial court may terminate parental rights for neglect pursuant to N.C.G.S. § 7B-1111(a)(1) if it determines the parent has neglected the juvenile within the meaning of N.C.G.S. § 7B-101. N.C.G.S. § 7B-1111(a)(1). A neglected juvenile is defined, in relevant part, as "[a]ny juvenile less than 18 years of age . . . whose parent, guardian, custodian, or caretaker . . . does not provide proper care, supervision, or discipline" or "[c]reates or allows to be created a living environment that is injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15)(a), (e) (2021).

> Termination of parental rights based upon this statutory ground requires a showing of neglect at the time

> of the termination hearing or, if the child has been separated from the parent for a long period of time, there must be a showing of a likelihood of future neglect by the parent. When determining whether such future neglect is likely, the district court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing.

In re R.L.D., 375 N.C. 838, 841 (2020) (cleaned up). "[E]vidence of changed conditions must be considered in light of the history of neglect by the parents and the probability of a repetition of neglect." *In re O.W.D.A.*, 375 N.C. 645, 648 (2020). "The determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*." *In re Z.G.J.*, 378 N.C. 500, 2021-NCSC-102, ¶ 26 (quoting *In re Ballard*, 311 N.C. 708, 715 (1984)).

¶ 12 Here the trial court found that Kenny was previously adjudicated neglected due to domestic violence between the parents and determined there was a likelihood of a repetition of neglect if Kenny was returned to respondent-father's care.

¶ 13 On appeal, respondent-father asserts he substantially completed the services required by his case plan and contends the trial court erred in determining that there was a likelihood of repetition of neglect. He asserts the trial court's determination of a likelihood of repetition of neglect "hinged" on unsupported findings that he failed to remediate the domestic violence that led to Kenny's removal. Respondent-father specifically contests only seven of the trial court's findings of fact. He first challenges finding of fact 63 to the extent the trial court found he "was not truthful with his therapists about what brought the juvenile into care or his role in the domestic violence" and his therapist "was unable to provide the proper therapy and tools for him due to him not being truthful or forthcoming." He contends the finding did not accurately reflect his therapist's testimony. Respondent-father also challenges portions findings of fact 40, 62, 64, 71, 72, and 75 to the extent the trial court found he had not demonstrated that he learned from the services in which he participated because he continued to engage in domestic violence. He asserts the only evidentiary basis for findings that he continued to engage in domestic violence were pending criminal domestic violence charges, which he contends did not amount to clear and convincing evidence because the charges had not been adjudicated. Respondent-father argues that absent the findings that he continued to engage in acts of domestic violence, the evidence and findings show that he "exceeded the services

required by his case plan" and do not support the determination that neglect was likely to recur if Kenny was returned to his care.

¶ 14 While neither DSS nor the guardian ad litem concede the challenged findings are unsupported by the evidence, both argue the trial court's unchallenged findings fully support its adjudication of neglect as grounds for termination. We agree the unchallenged findings, which "are deemed supported by competent evidence and are binding on appeal[,]" *In re T.N.H.*, 372 N.C. 403, 407 (2019), sufficiently support the trial court's conclusion that there was a likelihood of repetition of neglect without regard to the challenged findings. Therefore, we need not address or consider the challenged findings. *See id.* ("[W]e review only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights."); *see also In re A.R.A.*, 373 N.C. 190, 195 (2019) (limiting review to findings necessary to support the adjudication of grounds to terminate parental rights).

¶ 15 In the termination order, the trial court found Kenny had previously been adjudicated neglected due to domestic violence in the home and made unchallenged findings about the "long history of domestic violence which spans across different states" and "created a toxic, dangerous, and injurious environment for [Kenny]." Unchallenged findings describe the domestic violence as "chronic" and document respondent-father's role in the violence. Consistent with the allegations in the underlying juvenile petition and the findings in the prior adjudication order, the court made unchallenged findings about the domestic violence incident in March 2018 that resulted in respondent-father being charged with assault on a female and led to DSS's involvement, including that respondent-father "instructed the [mother] to tell law enforcement that the marks on her body came from [Kenny], who was only four (4) years old at that time"; and about respondent-father's violation of a DVPO and resistance to DSS's efforts to confirm Kenny's wellbeing. The court also found that during a supervised visit with Kenny in July 2018, respondent-father "had to be removed from [DSS]" after he "became irate with the [s]ocial [w]orker[,]" "was verbally aggressive[,]" and "and displayed a knife during [the] altercation." Furthermore, while respondent-father challenges the trial court's reliance on pending criminal charges as evidence of continued domestic violence, the court made unchallenged findings about the mother's numerous applications for DVPOs against respondent-father due to his threats to do her bodily harm, the most recent of which was filed in October 2019.

¶ 16 We note that it is clear from the evidence and findings that respondent-father did engage in his case plan. The trial court detailed

respondent-father's case plan requirements in the termination order and found that he "followed through with the majority of services ordered by the [c]ourt and recommended by [DSS]," including that he "had received counseling services with at least three (3) different therapists since the inception of this case." However, the court additionally found in unchallenged finding of fact 47 that "[w]hile the [parents] have engaged in, as well as continue to engage in, services to address these issues, they have failed to be able to demonstrate an ability to exhibit the methods taught through practical application. As a result, those issues have persisted throughout the duration of both this matter, as well as the underlying matter."

¶ 17 Additional unchallenged findings support the trial court's continued concern about domestic violence. The court specifically found in finding of fact 55 that in therapy sessions with one therapist, "[r]espondent[-f]ather has consistently denied initiating domestic violence with the [mother], as well as he has denied knowing why the juvenile was placed in the custody of [DSS]"; and the court found in finding of fact 56 that another therapist "was not aware that [respondent-father] was the aggressor based on what [he] reported to her" and therefore "was not providing the necessary course of treatment during their sessions." The trial court also specifically found in findings of fact 59 and 60 that respondent-father diminished developmental concerns displayed by Kenny and

> denie[d] that the domestic violence in his relationship with the [mother] had any affect [sic] on [Kenny] because [Kenny] was in the "toy room" while the [he and the mother] were fighting. . . . Respondent [-f]ather blames the domestic violence on the [mother's] personality defects. . . . There is a deflection of blame on all accounts and a failure by the [r]espondents to take responsibility for the causes that brought the juvenile into care. . . . Domestic [v]iolence has persisted between [them] since at least 2006, yet the [r]espondents insist that they can work together to co-parent.

¶ 18 The trial court specifically related respondent-father's continued denial of the domestic violence, minimization of its impact on Kenny, and refusal to accept any responsibility to the likelihood of repetition of neglect as follows:

> 60. Based on . . . ardent denials of [Kenny's] developmental delays and failure to take responsibility

> hereto, the [c]ourt finds that the neglect will more than likely repeat itself.
>
> 61. The [r]espondent[-f]ather continues to deny having any issues relating to domestic violence. The [r]espondent[-f]ather's denial is reason to believe that this issue will continue into the foreseeable future. The issue of domestic violence creates an injurious environment for the juvenile. Thus, it is highly likely that neglect would be repeated if [Kenny] was to be returned to either the [mother] or the [r]espondent [-f]ather's care.
>
> . . . .
>
> 65. The [parents'] continued minimization and denial of the domestic violence incidents is of concern with respect to the health and safety of [Kenny] if he was to be returned to either of the [parents]. The failure of the [parents] to acknowledge the severity of their actions, as well as the [mother's] continued failure to follow through with criminal charges against the [r]espondent[-f]ather is significant evidence to this [c]ourt that neither the [mother] nor the [r]espondent[-f]ather have alleviated the conditions that brought [Kenny] into the care of [DSS], and that this pattern would continue if [Kenny] was returned to either of them.

Ultimately, the trial court determined respondent-father had not adequately addressed the domestic violence that led to Kenny's removal and concluded there was a high probability of repetition of neglect if Kenny was returned to respondent-father's care.

¶ 19 Although respondent-father did engage in service of his case plan, "a parent's compliance with his or her case plan does not preclude a finding of neglect." *In re J.J.H.*, 376 N.C. 161, 185 (2020) (citing *In re D.W.P.*, 373 N.C. 327, 339–40 (2020) (noting the respondent's progress in satisfying the requirements of her case plan while upholding the trial court's determination that there was a likelihood that the neglect would be repeated in the future)); *see also In re Y.Y.E.T.*, 205 N.C. App. 120, 131 (explaining that a "case plan is not just a check list" and that "parents must demonstrate acknowledgment and understanding of why the juvenile entered DSS custody as well as changed behaviors"), *disc. review denied*, 364

N.C. 434 (2010).[4] In *J.J.H.*, this Court upheld the trial court's determination that a repetition of neglect was likely if the children were returned to the respondent's care despite her substantial case plan compliance because the concerns that resulted in the removal of the children continued to exist. *In re J.J.H.*, 376 N.C. at 185–86.

¶ 20 Here, the trial court's unchallenged findings show that while domestic violence was clearly identified as the reason for Kenny's removal and respondent-father engaged in services required by his case plan to address the issue, respondent-father continued to deny his role in the domestic violence, failed to acknowledge the effects the domestic violence had on Kenny, and refused to accept any responsibility for Kenny's removal. The unchallenged findings provide support for the trial court's continued concern that the issue of domestic violence had not been alleviated and support its conclusion that there was a likelihood of repetition of neglect if Kenny was returned to respondent-father's care. *See In re M.A.*, 374 N.C. 865, 874 (2020) (considering a parent's failure to comprehend and accept responsibility for their role in the domestic violence that plagued the family as supporting the court's determinations that there was a lack of reasonable progress and a likelihood of repetition of neglect); *see also In re L.N.G.*, 377 N.C. 81, 2021-NCSC-29, ¶ 23 (upholding the trial court's determination that there had not been meaningful progress to correct the causes of domestic violence where the parent failed to understand or adequately address the traumatic impact of domestic violence on her children); *In re A.R.A.*, 373 N.C. at 198 (upholding the trial court's determination that there had not been reasonable progress in addressing domestic violence where the parent continued to deny the effects of abuse on children, shifted blame to others, and refused to accept responsibility for the removal of the children).[5]

¶ 21 Accordingly, we hold that the trial court did not err by concluding that there was a likelihood of repetition of neglect and affirm the trial court's determination that respondent-father's parental rights were subject to termination for neglect pursuant to N.C.G.S. § 7B-1111(a)(1).

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4. The respondent in *In re Y.Y.E.T.* raised his compliance with his case plan as an argument challenging disposition. 205 N.C. App. at 130–31. The trial court addressed the argument but noted "compliance with the case plan is not one of the factors the trial court is to consider in making the best interest determination." *Id.* at 131.

5. Although *L.N.G.* and *A.R.A.* considered the lack of reasonable progress for purposes of termination pursuant to N.C.G.S. § 7B-1111(a)(2), a parent's failure to make progress is also relevant the determination that there is a likelihood of repetition of neglect for termination pursuant to N.C.G.S. § 7B-1111(a)(1). *See In re M.A.*, 374 N.C. at 870; *see also In re R.L.D.*, 375 N.C. at 841 (the court must consider evidence of changed circumstances).

III. Conclusion

¶ 22 Having determined the trial court did not err in adjudicating the existence of grounds to terminate parental rights, and because respondent-father does not challenge the trial court's best interests determination, we affirm the trial court's termination order.

AFFIRMED.

IN THE MATTER OF L.A.J. AND J.T.J.

No. 217A21

Filed 6 May 2022

Termination of Parental Rights—motion to continue—beyond ninety days after initial petition—extraordinary circumstances—notice of hearing

In a private termination of parental rights action, the trial court did not abuse its discretion in denying a mother's motion for a continuance beyond the statutory ninety-day period where there were no extraordinary circumstances to justify a continuance. While the mother claimed that it was difficult for her to travel from Ohio on such short notice (she claimed she received notice of the hearing date only five days in advance), she knew more than sixty days in advance which week the hearing would occur.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 2 March 2021 by Judge John K. Greenlee in District Court, Gaston County. This matter was calendared for argument in the Supreme Court on 18 February 2022 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

No brief for petitioner-appellees.

No brief for Guardian ad Litem.

Leslie Rawls for respondent-appellant mother.

IN RE L.A.J.

[381 N.C. 147, 2022-NCSC-54]

BERGER, Justice.

¶ 1 Respondent-mother[1] appeals from the trial court's order terminating her parental rights to her children, L.A.J. (Lucy) and J.T.J. (Joseph).[2] Upon review of this private termination action, we affirm the trial court.

I. Background

¶ 2 Lucy and Joseph were born in Gaston County, North Carolina in 2015 and 2016, respectively. Both children currently reside in Gaston County. Petitioners are also residents of Gaston County and have been court-appointed custodians of the two juveniles since April 2018.

¶ 3 On May 14, 2020, petitioners filed a verified petition in District Court, Gaston County to terminate the parents' parental rights on the grounds of willful abandonment pursuant to N.C.G.S. § 7B-1111(a)(7) (2019). The petition alleged that the parents, whose last known addresses were in Ohio, had not visited with the children since 2017; had not had contact with the children since March 2019; had not sent any gifts, cards, or written correspondence to the children; had failed to provide financial support to the children; and had failed to provide love, affection, or support to the children or make any effort to foster a relationship with them.

¶ 4 Respondent-mother was assigned counsel and served with the petition and summons in Ohio on June 9, 2020. She did not file an answer. The termination petition was calendared for hearing but continued three times at calendar call in 2020—the first time in July 2020 based on the needs of all parties; the second time in October 2020 upon a request by respondent-mother's newly appointed counsel; and the third time in December 2020 due to purported coronavirus issues.

¶ 5 On January 29, 2021, petitioners served a notice of hearing for February 10, 2021. When the case came on for hearing, respondent-mother was not present, and counsel for respondent-mother moved for a continuance. The trial court denied the motion to continue and proceeded with the hearing.

¶ 6 On March 2, 2021, the trial court entered an order terminating respondent-mother's parental rights to Lucy and Joseph. The court concluded that respondent-mother had willfully abandoned the children and termination of parental rights was in the children's best interests.

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1. The trial court's order also terminated the parental rights of the children's father who is not a party to this appeal.

2. Pseudonyms are used to protect the identity of the juveniles and for ease of reading.

Respondent-mother appeals, arguing that the trial court erred in denying counsel's motion to continue. Specifically, respondent-mother asserts that the trial court abused its discretion in denying the motion to continue because she had difficulty attending the hearing on short notice, traveling from her residence in Ohio to North Carolina was burdensome, and extraordinary circumstances existed due to coronavirus restrictions.[3] We disagree.

II. Analysis

¶ 7 This court has previously held:

> [A] motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review. If, however, the motion is based on a right guaranteed by the Federal and State Constitutions, the motion presents a question of law and the order of the court is reviewable. Moreover, regardless of whether the motion raises a constitutional issue or not, a denial of a motion to continue is only grounds for a new trial when defendant shows both that the denial was erroneous, and that he suffered prejudice as a result of the error.

In re M.J.R.B., 377 N.C. 453, 2021-NCSC-62, ¶ 11 (cleaned up).

¶ 8 Because counsel did not assert a constitutional basis for the requested continuance, we review denial of the motion to continue for abuse of discretion. *Id.*; *see also In re A.L.S.*, 374 N.C. 515, 517 (2020) ("Respondent-mother did not assert in the trial court that a continuance was necessary to protect a constitutional right. We therefore review the trial court's denial of her motion to continue only for abuse of discretion.").

¶ 9 "An abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re T.L.H.*, 368 N.C. 101, 107 (2015) (cleaned up). "In reviewing for an abuse of discretion, we are guided by the Juvenile Code, which provides that '[c]ontinuances that extend

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3. Respondent-mother acknowledges in her brief that counsel did not cite coronavirus concerns as grounds for the motion to continue. Respondent-mother has thus waived that argument, and we do not consider it on appeal. *See* N.C. R. App. P. 10(a)(1); *In re J.E.*, 377 N.C. 285, 2021-NCSC-47, ¶ 14.

beyond 90 days after the initial petition shall be granted only in extraordinary circumstances when necessary for the proper administration of justice.' " *In re J.E.*, 377 N.C. 285, 2021-NCSC-47, ¶ 15 (alteration in original) (quoting N.C.G.S. § 7B-1109(d) (2019)). "Furthermore, continuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it. The chief consideration is whether granting or denying a continuance will further substantial justice." *Id.* (cleaned up).

¶ 10 Petitioners filed their termination petition on May 14, 2020. Almost nine months passed before the case was finally called for hearing on February 10, 2021, due in part to the continuances discussed above. Respondent-mother was not present when the matter was called for hearing and counsel moved to continue the matter for a fourth time.

¶ 11 Although respondent-mother had not filed an answer to the petition, *see* N.C.G.S. § 7B-1107 (2019), counsel informed the trial court that she denied the allegations set forth in the petition and wished to be present to contest the proceeding. Counsel further asserted that: respondent-mother lives in Ohio; counsel sent her notice of the hearing on January 29, 2021, just as he had done on prior occasions to notify her of court dates and calendar calls; after "basically play[ing] phone tag" with respondent-mother all week, he was able to speak with her the morning of the hearing; and respondent-mother told counsel that she had only recently received the notice of hearing on February 5, 2021, and it was "difficult for her to get down here on short notice."

¶ 12 The record shows counsel was served with a notice of the February 10 hearing date on January 29, 2021. Counsel forwarded the notice of hearing by mail to respondent-mother that same day.

¶ 13 Respondent-mother claimed she did not receive the notice until February 5, 2021, five days before the hearing; however, even if respondent-mother was not aware of the specific date of the hearing until February 5, 2021, she was notified in December 2020 that the matter was rescheduled for the week of February 8, 2021. Counsel advised the trial court that he mailed a letter to respondent-mother on December 3, 2020, and respondent-mother concedes in her brief that counsel "apparently had notified her of the trial week after the case was continued at the 2 December 2020 calendar call." Thus, respondent-mother was notified as early as December 2020 that her case would be heard during the week of February 8, 2021. Consistent with this prior notification from counsel, respondent-mother thereafter received notice stating the specific date and time the termination hearing would be held.

¶ 14 Counsel further failed to provide any specific reasons why respondent-mother was unable to attend the hearing. Counsel merely asserted that it was "difficult for her to get down here on short notice." Even on appeal, when respondent-mother notes that the drive from Ohio takes eight hours and would have required a three-day trip to attend the hearing, she does not provide specific reasons for her absence. She instead suggests that "[m]ost people would require some advance notice to make a three-day trip[.]" Nonetheless, as noted above, respondent-mother received more than sixty-days' notice that the hearing would occur during the week of February 8, 2021.

¶ 15 "[C]ontinuances are not favored, [and] motions to continue ought not to be granted unless the reasons therefor are fully established." *In re D.J.*, 378 N.C. 565, 2021-NCSC-105, ¶ 14 (cleaned up). Respondent-mother received notice months in advance of the week the termination petition would be heard. She failed to provide any reason to justify the requested continuance. Having offered no legitimate reason for being unable to attend the hearing, respondent-mother failed to establish extraordinary circumstances requiring another continuance far beyond the ninety-day deadline. *See* N.C.G.S. § 7B-1109(d). Respondent-mother has failed to demonstrate that the trial court's denial of her motion to continue "is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re T.L.H.*, 368 N.C. at 107 (cleaned up). As such, the trial court did not abuse its discretion in denying counsel's motion to continue.

III. Conclusion

¶ 16 The trial court's denial of respondent-mother's motion to continue is affirmed.

AFFIRMED.

IN RE S.D.C.

[381 N.C. 152, 2022-NCSC-55]

IN THE MATTER OF S.D.C.

No. 274A21

Filed 6 May 2022

Termination of Parental Rights—best interests of the child—support for written findings—variation from oral findings

The trial court did not abuse its discretion by determining that it was in the child's best interests to terminate his mother's parental rights, where the court's findings of fact (with one exception) were supported by competent evidence and where those findings demonstrated a proper analysis of the dispositional factors set forth in N.C.G.S. § 7B-1110(a). The court was not bound by its oral statements at the dispositional hearing—regarding the parent-child bond and the mother's efforts toward reunification—when entering its final order, and therefore there was no error where the court's oral findings varied from its written findings. Further, the court was not required to enter any findings regarding dispositional alternatives to termination, such as guardianship.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from order entered on 3 May 2021 by Judge Clifton H. Smith in District Court, Catawba County. This matter was calendared in the Supreme Court on March 18, 2022 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Marcus P. Almond for petitioner-appellee Catawba County Department of Social Services.

Michelle FormyDuval Lynch for appellee Guardian ad litem.

Garron T. Michael for respondent-appellant mother.

BERGER, Justice.

¶ 1 Respondent-mother appeals from an order terminating her parental rights to S.D.C. (Scott),[1] born in September 2012.

1. A pseudonym is used in this opinion to protect the juvenile's identity and for ease of reading.

I. Background

¶ 2 Scott was born in September 2012. In December 2012, Mecklenburg County Department of Social Services obtained nonsecure custody of Scott and filed a petition alleging Scott to be an abused and neglected juvenile. On March 27, 2013, Scott was adjudicated an abused and neglected juvenile based upon findings that he had suffered nonaccidental trauma while in the care of his father, including multiple rib fractures and brain injuries.[2] Scott remained in foster care from December 2012 until June 2014, when the court returned legal and physical custody to respondent.

¶ 3 On May 30, 2019, Catawba County Department of Social Services (DSS) filed a petition alleging Scott was a neglected and dependent juvenile.[3] The petition alleged that on February 9, 2018, respondent shot herself in the foot while preparing to go to a shooting range with Scott present in the home, sleeping in another room. Respondent took Scott with her to the emergency room, where tests confirmed that she had been consuming alcohol. Further, on October 27, 2018, respondent was involved in an automobile accident after drinking two small bottles of vodka. Scott was a passenger in the vehicle at the time of the accident. Both respondent and Scott suffered injuries. After discharge from the hospital, respondent went to reside with the maternal grandparents and participated in substance abuse treatment.

¶ 4 DSS further alleged that on March 28, 2019, respondent was under the influence of alcohol while caring for Scott. An altercation occurred after respondent was confronted by the maternal grandparents about her alcohol abuse. Respondent attempted to remove Scott from their home, and she was subsequently arrested.

¶ 5 The trial court adjudicated Scott a neglected and dependent juvenile on September 19, 2019. The trial court awarded custody of Scott to DSS and approved placement with the maternal grandparents. The trial court identified a host of requirements for respondent to complete to achieve reunification. On November 27, 2019, the trial court found that, although respondent had been granted weekly supervised visitation with Scott for two hours, she missed three visits. Further, while respondent and Scott

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2. The father relinquished his parental rights to Scott on October 2, 2020, and is not a party to this appeal.

3. Jurisdiction over Scott and venue were transferred from Mecklenburg to Catawba County by orders entered in Mecklenburg County on August 2, 2019 and in Catawba County on August 5, 2019.

appeared to share a connection, additional observation was needed to better assess their bond. The trial court set the primary permanent plan as reunification, with a secondary plan of adoption. The trial court also established a visitation schedule that included supervised and unsupervised visits for the next three months.

¶ 6 After a subsequent permanency planning hearing held on January 22, 2020, the trial court entered another order on February 18, 2020. The trial court found that over a span of three months, respondent missed more than five visits, and she only rescheduled two. The trial court found that because respondent was observed as being "frustrated" during visits, continued observation was needed, and "healthier and more positive interactions" were necessary.

¶ 7 On September 16, 2020, the trial court entered an order finding that respondent had incurred two new alcohol-related criminal charges. She was also arrested on March 10, 2020, for public intoxication, March 11, 2020, for misuse of emergency communication systems, and on July 28, 2020, for obtaining property by false pretenses. The trial court changed the primary permanent plan to adoption, with a secondary plan of reunification.

¶ 8 DSS filed a motion to terminate respondent's parental rights to Scott on the grounds of neglect, willfully leaving Scott in foster care or placement outside the home for more than twelve months without making reasonable progress to correct the conditions that led to his removal, and willfully failing to pay a reasonable portion of the cost of care for Scott although physically and financially able to do so. On May 3, 2021, the trial court terminated respondent's parental rights to Scott. The court adjudicated that grounds to terminate respondent's parental rights existed under N.C.G.S. § 7B-1111(a)(1) and (2) and concluded that termination of respondent's parental rights was in Scott's best interests.

¶ 9 In the order, the trial court made the following findings of fact:

> 1. [Scott] is 8 years old.
>
> 2. It is almost certain that [Scott] would be adopted by his maternal grandmother and grandfather once he is legally clear. They are his current placement providers and would like to adopt him once he is legally clear for adoption.
>
> 3. Termination of Parental Rights will legally clear the child for adoption and will enable [DSS] to engage in the adoption process for [Scott].

> Adoption is the primary permanent plan for the minor child.
>
> 4. It is clear that [Scott] loves [respondent], but the two struggle to bond. Due to [respondent's] prolonged absences, [Scott] does not see her as a parental figure and feels as if he can make the decisions and be the "boss" of [respondent]. He does not listen to her well and continues to test to see how far or how long he can do something before she tells him "no."
>
> 5. [Scott] and his maternal grandparents have a strong bond. [Scott] feels safe and comfortable in the home with his grandparents and respects and honors them as his parents.
>
> 6. If [respondent] works on becoming substance-free, she will have no greater cheerleaders than the maternal grandparents, . . . who will be more than happy to allow her to be around her son if she is safe and sober. Hopefully the day is coming when she will leave her current damaging lifestyle behind. In the meantime, the minor child is in need of a safe permanent home and his grandparents are willing to provide that for him.

¶ 10 Respondent appeals. On appeal, respondent challenges some of the trial court's dispositional findings as not being supported by competent evidence and contends that the trial court abused its discretion in determining that it was in Scott's best interests that her parental rights be terminated.

II. Analysis

¶ 11 In a termination proceeding, when a trial court "determines that one or more grounds listed in section 7B-1111 are present, the court proceeds to the dispositional stage, at which the court must consider whether it is in the best interests of the juvenile to terminate parental rights." *In re D.L.W.*, 368 N.C. 835, 842, 788 S.E.2d 162, 167 (2016) (first citing *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614–15 (1997); and then citing N.C.G.S. § 7B-1110). "The trial court's dispositional findings of fact are binding on appeal if supported by the evidence received during the termination hearing or not specifically challenged on appeal." *In*

re K.N.L.P., 2022-NCSC-39, ¶ 11. A trial court's best interests determination "is reviewed solely for abuse of discretion." *In re A.U.D.*, 373 N.C. 3, 6, 832 S.E.2d 698, 700 (2019). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re T.L.H.*, 368 N.C. 101, 107, 772 S.E.2d 451, 455 (2015) (cleaned up).

¶ 12 Respondent first challenges the portion of finding of fact 4 which provides that Scott and respondent "struggle to bond." She contends that this portion of the finding is directly refuted by the trial court's oral statements made during the dispositional hearing and is not supported by the evidence.

¶ 13 Pursuant to Rule 58 of the North Carolina Rules of Civil Procedure, "a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court[.]" N.C.G.S. § 1A-1, Rule 58 (2021). This Court has held that "a trial court's oral findings are subject to change before the final written order is entered." *In re A.U.D.*, 373 N.C. at 9–10, 832 S.E.2d at 702. Therefore, respondent is unable to demonstrate error based merely on the fact that there were differences between the trial court's orally rendered findings of fact at the dispositional hearing and those set forth in the written order. *See, e.g.*, *In re A.U.D.*, 373 N.C. at 9–10, 832 S.E.2d at 702.

¶ 14 Moreover, finding of fact 4 is supported by the testimony of DSS social workers Kaitlyn Stutts and Kali Jacomine. Ms. Stutts testified that during visitations, Scott was "resistant and . . . trying to test" respondent. Ms. Jacomine further testified that respondent struggled to keep Scott's attention during visits, and Scott would "beg[i]n lashing out and really testing the limits with her." In contrast, when Ms. Jacomine visited with the maternal grandparents alone, she described Scott as "constantly wanting to come in there and see and sit with his grandparents and talk to them and engage with them." Thus, there is evidence in the record that supports the trial court's finding.

¶ 15 Respondent also challenges the portion of finding of fact 4 referencing her "prolonged absences." She argues that this finding is contrary to Ms. Jacomine's testimony and that the "only cause for gaps in her contact with Scott were the direct result of the limited supervised visitation schedule." While it is true that Ms. Jacomine testified that respondent only missed one visit with Scott, respondent overlooks the DSS court report which was admitted into evidence at the termination of parental rights dispositional hearing. This report highlights multiple gaps in her contact with Scott:

> Between the initial court hearing on 8/19/2019, and the court hearing on 10/28/2019, [respondent] had missed three of her supervised visits due to either issues with her car or illness. Between the court date on 10/28/2019 and 1/22/2020, [respondent] missed a total of six visits. [Respondent] stated those visits were missed either due to car issues, injuries from a fall at work, miscommunication due to the holidays, or illness. From 1/22/20 through 3/30/20, [respondent] missed 9 out of 21 possible visits. [Respondent] did not show up for the visit on 1/23/20, so no visits were held from 1/26/20 [through] 2/1/20. [Respondent] did not show up for the visit on 2/23/20 or 2/27/20, so no visits were held from 3/1[/2020 through 3/]7/2020. [Respondent] did not confirm her visit on 3/6/20, so no visits were held from 3/8[/2020 through 3/]14/2020.

¶ 16 The trial court could reasonably infer from this evidence that respondent's "prolonged absences" resulted in Scott not viewing her "as a parental figure." *See In re D.L.W.*, 368 N.C. at 843, 788 S.E.2d at 167–68 (stating that it is the trial court's duty to consider all the evidence, pass upon the credibility of the witnesses, and determine the reasonable inferences to be drawn therefrom).

¶ 17 In addition, respondent contests the portion of finding of fact 6 regarding the maternal grandparents' intentions of allowing respondent to be a part of Scott's life after her parental rights are terminated. The trial court found that the maternal grandparents "will be more than happy to allow [respondent] to be around [Scott] if she is safe and sober." While this appears to be an aspirational statement to encourage respondent, we agree with her that there is no evidence of record to support this challenged portion of finding of fact 6, and thus, we disregard it. *See*, *e.g.*, *In re S.M.*, 375 N.C. 673, 691, 850 S.E.2d 292, 306 (2020) (disregarding a finding of fact based on a guardian ad litem report not included in the record on appeal).

¶ 18 Next, respondent argues the trial court abused its discretion by concluding that it was in Scott's best interests to terminate her parental rights. Specifically, respondent argues that the trial court disregarded the alternative of guardianship and that the trial court's oral statements praising respondent's case plan efforts cut against the necessity of terminating her parental rights.

¶ 19 In determining whether termination of parental rights is in the best interests of a juvenile, a court shall consider

> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

N.C.G.S. § 7B-1110(a) (2021). This Court has previously observed that

> [t]he purpose of termination of parental rights proceedings is to address circumstances where parental care fails to "promote the healthy and orderly physical and emotional well-being of the juvenile," while also recognizing "the necessity for any juvenile to have a permanent plan of care at the earliest possible age." N.C.G.S. § 7B-1100. In North Carolina, the best interests of the child are the paramount consideration in termination of parental rights cases. *See In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984). Thus, when there is a conflict between the interests of the child and the parents, courts should consider actions that are within the child's best interests over those of the parents. N.C.G.S. § 7B-1100(3).

In re F.S.T.Y., 374 N.C. 532, 540, 843 S.E.2d 160, 165–66 (2020).

¶ 20 The trial court is not precluded from determining that termination of respondent's parental rights is in Scott's best interests merely because it made statements during the dispositional hearing acknowledging respondent's efforts at reunification. *In re A.U.D.*, 373 N.C. at 9–10, 832 S.E.2d at 702 (stating that "[a] trial court's oral findings are subject to change before the final written order is entered"). Furthermore, N.C.G.S. § 7B-1110(a) "does not require the trial court to make written findings regarding any dispositional alternatives it considered." *In re M.S.E.*, 378

N.C. 40, 2021-NCSC-76 ¶ 51. Here, the trial court's findings demonstrate that it considered the dispositional factors set forth in N.C.G.S. § 7B-1110(a) and "performed a reasoned analysis weighing those factors." *In re Z.A.M.*, 374 N.C. 88, 101, 839 S.E.2d 792, 801 (2020). Thus, the trial court did not abuse its discretion when it determined that termination of respondent's parental rights was in Scott's best interests.

III. Conclusion

¶ 21 The trial court did not err in terminating respondent's parental rights. The trial court's findings of fact were supported by the evidence presented to the trial court at the dispositional hearing. In addition, the trial court was not bound by its oral statements made regarding Scott's best interests, and the written findings support the trial court's conclusion that termination of respondent's parental rights was in Scott's best interests. As such, we affirm the trial court's order terminating parental rights.

AFFIRMED.

STATE v. WOODS

[381 N.C. 160, 2022-NCSC-56]

STATE OF NORTH CAROLINA
v.
CIERA YVETTE WOODS

No. 535A20

Filed 6 May 2022

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 275 N.C. App. 364, 853 S.E.2d 177 (2020), finding no error in a judgment entered on 10 May 2019 by Judge Karen Eady-Williams in Superior Court, Mecklenburg County. On 10 August 2021, the Supreme Court allowed defendant's petition for discretionary review as to additional issues. Heard in the Supreme Court on 21 March 2022.

Joshua H. Stein, Attorney General, by Jessica V. Sutton, Special Deputy Attorney General, for the State-appellee.

Glenn Gerding, Appellate Defender, by Aaron Thomas Johnson, Assistant Appellate Defender, for defendant-appellant.

PER CURIAM.

AFFIRMED.

Justice BERGER did not participate in the consideration or decision of this case.

STATE v. COBB

[381 N.C. 161, 2022-NCSC-57]

STATE OF NORTH CAROLINA
v.
DESHANDRA VACHELLE COBB

No. 28A21

Filed 6 May 2022

Search and Seizure—vehicle checkpoint—reasonableness—Brown factors

A police checkpoint was lawful under the Fourth Amendment pursuant to *Brown v. Texas*, 443 U.S. 47 (1979), where the checkpoint's purpose—ensuring that each driver had a valid driver's license and was not intoxicated—operated to advance public safety and was reasonable; the checkpoint was conducted on a major thoroughfare during early morning hours conducive to catching intoxicated drivers; and the checkpoint caused only a small amount of traffic backup, it was visible to approaching drivers, and it was conducted in accordance with a plan under a supervising officer with specific restraints on time, location, and officer conduct.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 275 N.C. App. 740, 853 S.E.2d 803 (2020), vacating an order entered on 3 April 2019 by Judge Claire V. Hill in Superior Court, Harnett County, and remanding the case for further proceedings. Heard in the Supreme Court on 15 February 2022.

Joshua H. Stein, *Attorney General*, *by Kindelle McCullen*, *Assistant Attorney General*, *for the State-appellant.*

Glenn Gerding, *Appellate Defender*, *by Wyatt Orsbon*, *Assistant Appellate Defender*, *for defendant-appellee.*

BERGER, Justice.

¶ 1 Defendant pleaded guilty to impaired driving after the trial court denied her motion to suppress evidence obtained at a Harnett County checking station. The Court of Appeals vacated the trial court's order denying defendant's motion to suppress, and the State appeals based upon a dissent. For the reasons stated below, we reverse the decision of the Court of Appeals and reinstate the order of the trial court.

I. Factual Background

¶ 2 At approximately 12:15 a.m. on August 28, 2016, defendant was driving her vehicle in Harnett County when she approached a checking station operated by the North Carolina State Highway Patrol. When defendant rolled down her window, Trooper BJ Holder detected a strong odor of alcohol emanating from the vehicle. Trooper Holder asked defendant if she had been drinking, and defendant responded that she had two shots of Grey Goose vodka at a bar. Trooper Holder asked defendant to step out of the vehicle.

¶ 3 Upon exiting, defendant was unsteady on her feet and Trooper Holder requested that defendant perform standard field sobriety tests, including a horizontal gaze nystagmus (HGN) test. Six of six clues of impairment were present when the HGN test was administered. A breath sample provided by defendant at the Harnett County Detention Center registered a blood alcohol level of 0.11 on the Intox EC/IR II device. Defendant was charged with one count of driving while impaired and one count of reckless driving.[1]

¶ 4 A Checking Station Authorization form (HP-14 form) was completed for the checking station by Sergeant John Bobbitt of the NCSHP. The form indicated that the primary purpose of the checking station was "Chapter 20 enforcement" which included "at a minimum, checking each driver stopped for a valid driver's license and evidence of impairment." Further, pursuant to the information set forth on the HP-14 form, the checking station was to operate between the hours of 12:15 a.m. and 2:00 a.m. on August 28, 2016, and Sergeant Bobbitt was noted as the supervising member in charge.

¶ 5 On February 6, 2019, defendant filed a motion to suppress evidence of her blood alcohol level contending that the checking station was unconstitutional and violated N.C.G.S. § 20-16.3A.[2] Thus, defendant argued, "any evidence obtained [wa]s in violation of [d]efendant's rights and must be suppressed and any charges arising therefrom must be dismissed."

¶ 6 From the testimony presented at the hearing on the motion to suppress, the trial court found as fact that Sergeant Bobbitt had been employed with the NCSHP for approximately twenty-five years. In addition,

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1. The State later dismissed the charge of reckless driving.

2. Defendant did not argue on appeal that the checking station violated N.C.G.S. § 20-16.3A. Defendant has, therefore, abandoned the argument. *See* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

the trial court found that Sergeant Bobbitt completed and signed the HP-14 form, and the form "complied with the statutory and other regulatory requirements regarding checking stations." The findings of fact detailed that the checking station was located "a short distance to [NC] Highway 87 and three county lines making it a major thoroughfare into and out of the county." "The public concern addressed[,]" the trial court went on to find, "was the public safety in confirming motorists were in compliance and not violating any Chapter 20 Motor Vehicle Violation."

¶ 7 Additionally, the trial court included findings of fact related to the execution of the checking station by the NCSHP. Specifically, the trial court found that "[t]he seizure was short in time for most drivers . . . since most drivers were stopped for less than one minute" if they "had their driver's license and registration." Further, the trial court's findings indicate that "[a]t least two [NCSHP] vehicles with blue lights were on at all times[,]" and "[t]he participating members were wearing their [NCSHP] uniforms with reflective vests and utility flashlights." This allowed for the checking station to be "observed from any direction of approach from one-tenth up to one-half a mile [away,]" giving drivers "adequate time to observe the checking station and come to a stop." The trial court also found that although "[t]raffic did back up some" because "every vehicle that approached this checking station was checked[,]" the negative effect on the flow of traffic was "not extreme."

¶ 8 Based on these findings of fact, the trial court then concluded as a matter of law that:

> 1. The plan was reasonable and the checking station did not violate the Defendant's U.S. or N.C. constitutional rights.
>
> 2. The checking station as it was operated advanced the public concern and was reasonable.
>
> 3. Enforcement of the motor vehicle laws is a legitimate public purpose and promotes public safety.
>
> 4. The short amount of time that the checking station potentially interfered with an individual's liberty was not significant.

Accordingly, the trial court denied defendant's motion to suppress.

¶ 9 Following the denial of the motion to suppress, defendant pleaded guilty to the charge of driving while impaired, expressly reserving her right to appeal the denial of the motion to suppress. Defendant's

sentence of sixty days imprisonment was suspended, and she was placed on unsupervised probation. Defendant timely appealed.

¶ 10 In a split decision, the Court of Appeals vacated the trial court's order denying defendant's motion to suppress and remanded the case for further proceedings. *State v. Cobb*, 275 N.C. App. 740, 752, 853 S.E.2d 803, 811 (2020). The majority reasoned that because the trial court "did not adequately weigh the three *Brown* factors" required in such an analysis, the trial court "could not assess whether the public interest in this [checking station] outweighed its infringement on [d]efendant's Fourth Amendment privacy interests." *Id.* at 749, 853 S.E.2d at 809. The Court of Appeals determined, and defendant now argues, that the trial court erred in concluding that the checking station was reasonable without adequately engaging in the analysis required by the United States Supreme Court in *Brown v. Texas*, 443 U.S. 47, 50, 99 S. Ct. 2637, 2640, 61 L. Ed. 2d 357, 361 (1979).

¶ 11 Based on a dissenting opinion, the State timely appealed to this Court, arguing that the majority below erred in concluding that the trial court's order denying defendant's motion to suppress was insufficient to evaluate the constitutionality of the checking station.

II. Standard of Review

¶ 12 "[A] trial court's ruling on a motion to suppress is afforded great deference upon appellate review as it has the duty to hear testimony and weigh the evidence." *State v. McClendon*, 130 N.C. App. 368, 377, 502 S.E.2d 902, 908 (1998), *aff'd*, 350 N.C. 630, 517 S.E.2d 128 (1999); *see also State v. Smith*, 278 N.C. 36, 41, 178 S.E.2d 597, 601 (1971). An appellate court's review of a trial court's denial of a motion to suppress "is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Findings of fact not challenged on appeal are "deemed to be supported by competent evidence and are binding on appeal." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011). Conclusions of law, however, are reviewed de novo and are subject to full review by this Court. *Id.*

¶ 13 Defendant did not challenge any of the trial court's findings of fact as unsupported by the evidence in the record. Thus, the trial court's findings of fact are binding on appeal.

III. Analysis

¶ 14 The Fourth Amendment protects "[t]he right of the people to be secure . . . against unreasonable searches and seizures." U.S. Const. amend. IV. Because law enforcement officers effectuate a seizure when they stop a vehicle at a checking station, such stops must conform to Fourth Amendment requirements. *City of Indianapolis v. Edmond*, 531 U.S. 32, 40, 121 S. Ct. 447, 453, 148 L. Ed. 2d 333, 342 (2000); *see also United States v. Martinez-Fuerte*, 428 U.S. 543, 556, 96 S. Ct. 3074, 3082, 49 L. Ed. 2d 1116, 1127 (1976) ("[C]heck[ing station] stops are 'seizures' within the meaning of the Fourth Amendment."). The ultimate question in challenges to the validity of a checking station is "whether such seizures are 'reasonable' under the Fourth Amendment." *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 450, 110 S. Ct. 2481, 2485, 110 L. Ed. 2d 412, 420 (1990).

¶ 15 As an initial matter, the Supreme Court has instructed that reviewing courts must consider the primary programmatic purpose of a challenged checking station. *Edmond*, 531 U.S. at 40–42, 121 S. Ct. at 453–54, 148 L. Ed. 2d at 342–44. Checking stations established primarily to "uncover evidence of ordinary criminal wrongdoing" run afoul of the Fourth Amendment. *Edmond*, 531 U.S. at 42, 121 S. Ct. at 454, 148 L. Ed. 2d at 343. However, checking stations "designed primarily to serve purposes closely related to . . . the necessity of ensuring roadway safety" have been held to serve a legitimate primary purpose. *Id.* at 41, 121 S. Ct. at 454, 148 L. Ed. 2d at 333; *see also Sitz*, 496 U.S. at 451, 110 S. Ct. at 2485, 110 L. Ed. 2d 412. In addition, the Supreme Court has upheld checking stations designed to address problems related to policing the border and to assist law enforcement officers in obtaining information to apprehend "other individuals" involved in criminal activity. *See Martinez-Fuerte*, 428 U.S. at 545, 96 S. Ct. at 3077, 49 L. Ed. 2d at 1116; *Illinois v. Lidster*, 540 U.S. 419, 427, 124 S. Ct. 885, 891, 157 L. Ed. 2d 843, 852 (2004).

¶ 16 Here, the primary programmatic purpose of the checking station was uncontested. At the hearing on the motion to suppress, defense counsel acknowledged the primary purpose of the checking station was "to check licenses. We don't disagree . . . they got to the primary purpose[.]" Defendant's concession is reflected in the trial court's unchallenged finding that "[t]here was no argument by the defendant that the purpose of the checking station was . . . not a permitted primary [programmatic] purpose." The trial court's finding is therefore binding on appeal, and we must next determine the reasonableness of the checking station under the Fourth Amendment. *Edmond*, 531 U.S. at 47, 121 S. Ct. at 457, 148 L. Ed. 2d at 347.

¶ 17 This Court has held that "check[ing stations] are constitutional if vehicles are stopped according to a neutral, articulable standard (e.g., every vehicle) and if the government interest in conducting the check[ing station] outweighs the degree of the intrusion." *State v. Foreman*, 351 N.C. 627, 631, 527 S.E.2d 921, 924 (2000). "The reasonableness of seizures that are less intrusive than a traditional arrest depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." *Brown*, 443 U.S. at 50, 99 S. Ct. at 2640, 61 L. Ed. 2d at 361 (cleaned up). "[W]e must judge [the] reasonableness [of a checking station], hence, its constitutionality, on the basis of individual circumstances." *State v. Mitchell*, 358 N.C. 63, 66, 592 S.E.2d 543, 545 (2004) (first and second alterations in original) (quoting *Lidster*, 540 U.S. at 426, 124 S. Ct. at 890, 157 L. Ed. 2d at 852 (2004)).

¶ 18 In determining whether a seizure that results from a checking station survives constitutional scrutiny, we "weigh[ ] . . . the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Brown*, 443 U.S. at 50–51, 99 S. Ct. at 2640, 61 L. Ed. 2d at 362. Upon a balancing of these factors, a checking station is deemed reasonable, and therefore constitutional, if the factors weigh in favor of the public interest. *Lidster*, 540 U.S. at 427, 124 S. Ct. at 890, 157 L. Ed. 2d at 852.

¶ 19 Our nation's highest court has held that driver's license checking stations typically satisfy the first *Brown* prong because "the public concerns served by the seizure" outweigh the Fourth Amendment interest of individuals. *Id.* (quoting *Brown*, 443 U.S. at 50–51, 99 S. Ct. at 2640, 61 L. Ed. 2d at 362); *see also State v. Rose*, 170 N.C. App. 284, 294, 612 S.E.2d 336, 342, *disc. review denied*, 359 N.C. 641, 617 S.E.2d 656 (2005) (holding that license and registration checking stations advance an "important purpose"). The public interest in ensuring compliance with motor vehicle laws is a well-established and important public concern. *See Rose*, 170 N.C. App. at 294, 612 S.E.2d at 342. "States have a vital interest in ensuring that only those qualified to [drive] are permitted to operate motor vehicles . . . ." *Delaware v. Prouse*, 440 U.S. 648, 658, 99 S. Ct. 1391, 1398, 59 L. Ed. 2d 660, 670 (1979). Moreover, the Supreme Court has recognized that "[n]o one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. . . . For decades, this Court has repeatedly lamented the tragedy [of deaths resulting from impaired drivers]." *Sitz*, 496 U.S. at 451, 110 S. Ct. at 2485–86, 110 L. Ed. 2d at 420–21 (cleaned up).

¶ 20 Consistent with the requirement of *Brown*, the trial court found that "[t]he public concern addressed with this particular checking station was the public safety in confirming motorists were in compliance and not violating any Chapter 20" provision and that this purpose was clearly set forth in establishing the checking station. The trial court determined the purpose of ensuring each driver had a valid driver's license and was not driving while impaired "operated [to] advance[ ] the public concern and was reasonable."

¶ 21 Under the second prong of the *Brown* analysis, the trial court examined "the degree to which the seizure advance[d] the public interest." *Brown*, 443 U.S. at 51, 99 S. Ct. at 2640, 61 L. Ed. 2d at 362. A consideration at this step is whether "[t]he police appropriately tailored their check[ing station] stops" to fit the primary purpose. *Lidster*, 540 U.S. at 427, 124 S. Ct. at 891, 157 L. Ed. 2d at 852. Alongside other factors, the use of time and location limitations in establishing and operating the checking station provides evidence that the vehicle stop was appropriately tailored. *See id.* (finding that the police's selection of a specific time and location was sufficiently tailored as "[t]he stops took place about one week after [a] hit-and-run accident, on the same highway near the location of the accident, and at about the same time of night").

¶ 22 Based on the evidence presented, the trial court found that the checking station was planned and operated pursuant to a HP-14 form completed by Sergeant Bobbitt. The checking station was established a short distance from NC Highway 87, on a heavily travelled thoroughfare in an area where three county lines converge. Additionally, the trial court found the checking station was in effect during a previously agreed upon timeframe and date, between 12:15 a.m. and 2:00 a.m. on August 28, 2016, and extended no longer than that time. These findings demonstrate that the checking station was conducted in a location where there was increased motor vehicle traffic and during a timeframe conducive to apprehending impaired drivers.

¶ 23 With respect to the final factor of the *Brown* analysis, the severity of the interference with individual liberty, the focus shifts to how the checking station was conducted. *Brown*, 443 U.S. at 51, 99 S. Ct. at 2640, 61 L. Ed. 2d at 362. Specifically, the third factor requires a checking station to "be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Id.* This ensures that officers are not able to exercise "unfettered discretion" that results in the invasion of motorists' liberties. *Id.*

¶ 24 The Supreme Court has designated a number of nonexclusive factors as relevant considerations, including the checking station's interference with regular traffic, whether notice of the checking station was given to approaching drivers, and whether there was a supervising official overseeing the checking station. *See Martinez-Fuerte*, 428 U.S. at 559, 96 S. Ct. at 3083–84, 49 L. Ed. 2d at 1129.

¶ 25 Here, as discussed above, the trial court's unchallenged findings of fact show that the checking station was conducted pursuant to the plan established and documented by Sergeant Bobbitt. The plan included explicit limitations regarding the location and timeframe of the checking station. Further, the trial court found that all vehicles were stopped pursuant to the established plan. While the trial court found that "[t]raffic did back up some" because all vehicles were stopped, the backup was "not extreme."

¶ 26 Moreover, the trial court found that drivers were put on notice of the checking station as "[a]t least two [NCSHP] vehicles with blue lights were on at all times" during the checking station. Additionally, the trial court found that "participating members were wearing their [NCSHP] uniforms with reflective vests and utility flashlights." Finally, based on evidence showing that the checking station was approved and executed by Sergeant Bobbitt, the trial court made various findings indicating that the checking station was operated under a supervising officer from start to finish.

¶ 27 In focusing on the specific conduct of the officers during the vehicle stops, the trial court found that officer conduct was sufficiently limited, stating:

> 19. The seizure was short in time for most drivers . . . since most drivers were stopped for less than one minute.
>
> . . . .
>
> 28. If drivers had their driver's license and registration the stop lasted one minute or less.

These findings indicate that the checking station was not operated with "unfettered discretion" but rather with specific restraints on time, location, and officer conduct. It follows that the trial court properly concluded that the "short amount of time that the checking station potentially interfered with an individual's liberty was not significant." Thus, the checking station was appropriately tailored to address the stated purpose.

¶ 28 In balancing the factors set forth in *Brown*, the trial court concluded that the public interest served by the checking station outweighed the intrusion on defendant's liberty interests. The unchallenged findings of fact support this conclusion, and the checking station was reasonable under the Fourth Amendment.

IV. Conclusion

¶ 29 Based on our review of the trial court's unchallenged findings of fact, the public interest in conducting the checking station outweighed any intrusion on defendant's liberty interests, and the checking station was, therefore, reasonable under the Fourth Amendment. Accordingly, we reverse the decision of the Court of Appeals and reinstate the order of the trial court denying defendant's motion to suppress.

REVERSED.

STATE OF NORTH CAROLINA
v.
ISIAH BOYD

No. 126PA20

Filed 6 May 2022

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, No. COA19-543, 2020 WL 774113 (N.C. Ct. App. Feb. 18, 2020), finding no error in a judgment entered on 19 July 2018 by Judge Hugh B. Lewis in Superior Court, Mecklenburg County. Heard in the Supreme Court on 21 March 2022.

Joshua H. Stein, Attorney General, by Keith T. Clayton, Special Deputy Attorney General, for the State-appellee.

Jason Christopher Yoder for defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE v. FAROOK

[381 N.C. 170, 2022-NCSC-59]

STATE OF NORTH CAROLINA
v.
KHALIL ABDUL FAROOK

No. 457PA20

Filed 6 May 2022

1. Evidence—attorney-client privilege—speedy trial claim—defense attorney testified for State regarding trial strategy—plain error

In a prosecution for charges stemming from a fatal car accident, where more than six years passed before defendant's case was brought to trial, during which he was represented by four different attorneys, the trial court committed plain error by allowing one of defendant's attorneys to testify for the State regarding trial strategy to counter defendant's claim that his right to a speedy trial was violated. The attorney's testimony regarding delay tactics divulged privileged communications in the absence of any waiver by defendant of the attorney-client privilege; defendant's pro se claim for ineffective assistance of counsel regarding his attorney's delays was invalid for having been filed when defendant was represented by counsel and therefore could not constitute a waiver or justification. The matter was remanded for the trial court to reweigh any admissible evidence submitted by the State to justify the delay as part of the balancing test set forth in *Barker v. Wingo*, 407 U.S. 514 (1972).

2. Constitutional Law—right to speedy trial—Barker factors—evaluation of prejudice to defendant—misapplication of correct standard

In a prosecution for charges stemming from a fatal car accident, where more than six years passed before defendant's case was brought to trial, the trial court misapplied the proper standard for determining whether the delay prejudiced defendant pursuant to *Barker v. Wingo*, 407 U.S. 514 (1972), by first finding that the State had been prejudiced by the delay, and by determining that the prejudice factor weighed against defendant because he did not demonstrate actual prejudice. The constitutional right to a speedy trial is granted to defendants to protect against prosecutorial delay, and prejudice may be shown by presumptive rather than actual prejudice.

Justice BERGER dissenting.

Chief Justice NEWBY and Justice BARRINGER join in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 274 N.C. App. 65 (2020), reversing an order denying defendant's motion to dismiss for a violation of his Sixth Amendment right to a speedy trial entered on 8 October 2018 by Judge Anna Mills Wagoner in Superior Court, Rowan County, and vacating judgments entered on 10 October 2018 by Judge Anna Mills Wagoner in Superior Court, Rowan County. Heard in the Supreme Court on 8 November 2021.

Joshua H. Stein, Attorney General, by John W. Congleton, Assistant Attorney General, for the State-appellant.

Sarah Holladay for defendant-appellee.

EARLS, Justice.

¶ 1 Over six years elapsed between the initial indictment of defendant Khalil Abdul Farook on 19 June 2012 for multiple charges arising out of an incident where Mr. Farook, driving impaired, hit and killed two people riding a motorcycle and his trial that began on 8 October 2018. The trial court denied his pretrial motion to dismiss on speedy trial grounds and he was convicted by a jury of felony hit and run resulting in serious injury or death, two counts of second-degree murder, and attaining violent habitual felon status. He was sentenced to two terms of life imprisonment without the possibility of parole, plus twenty-nine to forty-four months. Mr. Farook appealed to the Court of Appeals asserting that the trial court erred in denying his motion to dismiss.

¶ 2 On appeal, the Court of Appeals reversed the trial court's order and vacated defendant's convictions on the grounds that the delay in his case was unjustified and violated his Sixth Amendment right to a speedy trial, applying the balancing framework set forth in *Barker v. Wingo*, 407 U.S. 514 (1972). *State v. Farook*, 274 N.C. App. 65, 88 (2020). Before the trial court, the State's explanation for its delay in bringing Mr. Farook to trial centered on the testimony of one of Mr. Farook's attorneys, who testified that it was his strategy to delay the case in the hope of obtaining a better outcome for his client. The Court of Appeals held that eliciting this information from Mr. Farook's attorney, while the attorney was testifying for the State, violated Mr. Farook's attorney-client privilege by

revealing strategic decisions the attorney made on behalf of his client. *Id.* at 84. Because this testimony should not have been admitted, and because the State could not carry its burden of attempting to explain the trial delay without the testimony when considering the weight of the evidence under the *Barker* test, the Court of Appeals concluded that Mr. Farook's motion to dismiss should have been granted. *Id.*

¶ 3 We affirm the Court of Appeals' holding on the evidentiary question and conclude that the trial court improperly admitted the testimony of Mr. Farook's prior attorney where there was no waiver of the attorney-client privilege. Because the trial court plainly erred in admitting the testimony of Mr. Farook's former attorney as evidence against him without justification or waiver, the trial court's order must be reversed. However, the State may have had alternative ways to put into evidence the same facts the attorney testified to if the improperly admitted testimony had not been admitted in the first place. The State may also have decided to rely on entirely different facts not elicited before the trial court if it had not been allowed to introduce the improperly admitted testimony. While the delay in this case is extraordinary and the facts in the record relied on by the Court of Appeals in concluding that Mr. Farook's Sixth Amendment rights were violated appear largely uncontested, we nevertheless remand this case for a rehearing on Mr. Farook's speedy trial claim rather than evaluate the evidence at this stage. Accordingly, we reverse the holding of the Court of Appeals to the extent that it allowed Mr. Farook's motion to dismiss. *Cf. State v. Salinas*, 366 N.C. 119, 124 (2012) (remanding for further factual findings where the trial court improperly relied upon the allegations presented in defendant's affidavit when making its findings of fact).

I. Background

¶ 4 In 2012, Mr. Farook was involved in a fatal automobile crash when his vehicle crossed the centerline of the road and collided with a motorcycle being ridden by Tommy and Suzette Jones. Mr. and Mrs. Jones died following the collision. Another driver, Miguel Palacios, witnessed the collision. Mr. Palacios observed Mr. Farook approach the bodies of the victims and then leave the scene of the accident.

¶ 5 Armed with a description of the suspect, police officers traveled to the address of a residence located near the scene of the collision. The apparent owner of the home led officers into a room where one of the officers observed the name "Khalil Farook" on a prescription bottle atop a coffee table. The property owner then explained that "Donald Miller" had changed his name and that "Donald Miller" and "Khalil Farook"

were the same person. Mr. Farook turned himself in to the authorities on 19 June 2012 after warrants had been issued for his arrest on various charges stemming from the collision. Later that month, Mr. Farook was indicted for reckless driving to endanger, driving left of center, driving while license revoked, felony hit and run resulting in serious injury or death, driving while impaired, resisting a public officer, and two counts of felony death by vehicle.

¶ 6 Mr. Farook was represented by four different attorneys during the pendency of his case. In early July 2012, following his arrest, Mr. James Randolph was appointed to represent Mr. Farook. Thereafter, after his case had been pending for a year, Mr. Farook wrote to the trial court on 12 July 2013 stating that he had been incarcerated for a year and was concerned about the status of his case, particularly because he had not yet received discovery. Subsequently, Mr. James Davis was appointed as Mr. Farook's second attorney in the case. Mr. Davis replaced Mr. Randolph in early December 2014.[1] Mr. Davis represented Mr. Farook for nearly three years, during which time the case remained pending, and Mr. Farook remained incarcerated.

¶ 7 Ultimately, Mr. Davis withdrew from Mr. Farook's case because of the demands of his other work. He was replaced as counsel in July 2017 by Mr. David Bingham, Mr. Farook's third attorney. On 17 July 2017, over five years after the collision, Mr. Farook was indicted for the following new, more serious charges: two counts of second-degree murder and one count of attaining violent habitual felon status. In September 2017, Mr. Bingham withdrew from the case due to a conflict of interest. Mr.

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1. There is some evidence in the record tending to suggest that Mr. Davis began representing Mr. Farook in 2012. Specifically, the trial court announced at a hearing on 6 August 2012 that it would appoint Mr. Davis to replace Mr. Randolph as counsel for Mr. Farook; in a 2018 order on a motion to dismiss, the trial court found Mr. Davis's appointment date to be 6 August 2012; in Mr. Davis's motion to withdraw as counsel he attests that he began representing Mr. Farook on or about 27 August 2012; and Mr. Farook asserted in a pro se motion to dismiss for ineffective assistance of counsel that Mr. Davis was appointed as his attorney in August 2012. Notwithstanding this evidence, the trial court's order of assignment specifies that Mr. Davis was ordered to serve as Mr. Farook's attorney on 10 December 2014. Similarly, although the Court of Appeals' opinion also acknowledges discrepancies in the record regarding Mr. Davis's date of appointment as counsel, the court nonetheless observed that on 10 December 2014 Mr. Davis was explicitly appointed to replace Mr. Randolph as Mr. Farook's counsel. *State v. Farook*, 274 N.C. App. 65, 66 (2020). Likewise, in its brief filed in this Court, the State cites the 10 December 2014 order when referencing Mr. Davis's appointment as Mr. Farook's attorney. Any discrepancy in the record on this point has no bearing on our ultimate conclusion that at the hearing on Mr. Farook's speedy trial motion, Mr. Davis divulged privileged, inadmissible information concerning his representation of Mr. Farook—testimony that was improper irrespective of whether Mr. Davis began representing Mr. Farook in 2012 or 2014.

Chris Sease, Mr. Farook's fourth attorney, was appointed to represent him in late September 2017. He represented Mr. Farook through the trial in October 2018.

¶ 8 In March 2018, Mr. Farook wrote to the clerk of court asking for "information (motions) concerning my t[rial] delay for the years of 2013, 2014, 2015, 2016, 2017 that the district attorney['s] office file[d] to delay my trial." The clerk responded, "There are no written motions in any of your files." Mr. Farook filed a pro se motion to dismiss the charges against him on the grounds of a speedy trial violation and ineffective assistance of counsel (IAC) in early September 2018. In the pro se motion, Mr. Farook alleged that his previous attorney, Mr. Davis, did not speak to him until fifty-seven months after Mr. Davis was appointed, that Mr. Farook never agreed to any delays in his trial, and that Mr. Farook had been prejudiced both by the deficient representation that he had received from Mr. Davis and the delay in his case.

¶ 9 Later that same month, Mr. Sease filed a motion to dismiss for a speedy trial violation alleging that Mr. Farook was not charged or served with indictments for second-degree murder and attaining violent habitual felon status until July 2017 even though the collision occurred five years earlier in June 2012. The motion alleged that Mr. Farook believed the State delayed the case "in an attempt to oppress, harass and punish him further"; that due to the extensive delay he was "prejudiced by an inability to adequately assist his defense attorney" in preparing for trial; and that "it is arguable" that he never would have been charged with second-degree murder had the case been resolved between 2012 and 2017 rather than long after the date of the offense. The State opposed the motion.

¶ 10 Notably, in his motion to dismiss, Mr. Farook chronicled the prolonged delay that evolved over the life of his case from the date of his arrest in June 2012 to his eventual prosecution in October 2018. After Mr. Farook rejected plea offers from the State in August 2012, the case was not calendared again until the week of 18 February 2013, almost six months later. The case was first calendared for the week of 6 August 2012, the date on which Mr. Randolph withdrew as Mr. Farook's attorney. Between 2013 and 2018, Mr. Farook's case was calendared but not reached *nine* times. After the case had been calendared but not reached five times, Mr. Farook was indicted on more serious charges. No motion to continue the case was ever filed by the State or Mr. Farook. *Cf. State v. Farmer*, 376 N.C. 407, 409 (2020) (emphasizing that the defendant filed his motion for a speedy trial approximately two months after he acquiesced to the State's request to continue his case from the January 2017 calendar to the next trial session).

¶ 11 As illustrated below, Mr. Farook's case was repeatedly delayed as it continued to be calendared but not reached while Mr. Farook remained imprisoned for 2,302 days.

11 July 2012	Mr. Randolph is appointed by court order to represent Mr. Farook.
18 February 2013	Mr. Farook's case was calendared but not reached.
19 March 2013	Mr. Farook's case was calendared but not reached.
16 April 2013	Mr. Farook's case was calendared but not reached.
12 July 2013	Mr. Farook wrote a letter to Judge Wagoner stating that he had been incarcerated for a year and had not received his discovery.
10 December 2014	Mr.Davis is appointed by court order to represent Mr. Farook.
15 July 2015	Mr. Farook's case was calendared but not reached.
13 February 2017	Mr. Farook's case was calendared but not reached.
5 July 2017	Mr. Farook's case was calendared but not reached. Mr. Farook was indicted on more serious charges: two counts of second-degree murder and one count of attaining violent habitual felon status. Mr. David Bingham is appointed by court order to represent Mr. Farook.
29 August 2017	Mr. Farook's case was calendared but not reached.
25 September 2017	Mr. Sease was appointed by court order to represent Mr. Farook.
26 September 2017	Mr. Farook's case was calendared but not reached.
8 January 2018	Mr. Farook's case was calendared but not reached.

17 March 2018	Mr. Farook wrote to the clerk of court asking for "information (motions) concerning my t[rial] delay for the years of 2013, 2014, 2015, 2016, 2017 that the district attorney['s] office file[d] to delay my trial."
10 September 2018	Mr. Farook filed a pro se motion to dismiss alleging a Sixth Amendment violation.
13 September 2018	Mr. Sease filed a motion to dismiss alleging a Sixth Amendment violation.

¶ 12 A hearing on Mr. Farook's motion to dismiss was held on 24 September 2018. Mr. Farook's former attorney, Mr. Davis, testified against him as the State's sole witness. Importantly, Mr. Davis testified that it was his desire to delay the case once it became clear that Mr. Farook would possibly face a violent habitual felon indictment because in his experience delay would work to Mr. Farook's advantage. He also testified generally to the backlog of cases that beset the Rowan County courts at the time and explained that he told Mr. Farook sometime during his representation that it was unlikely he would be available to represent him at a trial because of his other professional obligations.

¶ 13 On the dismissal motion, the trial court acknowledged the over six-year delay in Mr. Farook's case, and that Mr. Farook remained in jail awaiting trial since the date he was arrested on 19 June 2012. However, in weighing the evidence offered by the State and Mr. Farook and considering it in light of the *Barker* factors, the trial court ultimately determined that Mr. Farook's Sixth Amendment right to a speedy trial was not violated, and the court denied his motion to dismiss on 8 October 2018. That same day, Mr. Farook's trial began. Two days later, a jury found him guilty of one count of hit and run resulting in serious injury or death and two counts of second-degree murder. Mr. Farook entered into plea agreements for the remaining charges. The trial court sentenced Mr. Farook to two terms of life imprisonment without the possibility of parole, plus twenty-nine to forty-four months. He appealed his convictions.

II. Court of Appeals Decision

¶ 14 Mr. Farook argued before the Court of Appeals that the trial court erred in denying his motion to dismiss and in finding that his constitutional right to a speedy trial had not been violated under the four-factor balancing test described in *Barker*, 407 U.S. at 530. The four factors include the "[l]ength of delay, the reason for the delay, the defendant's

assertion of his right, and prejudice to the defendant." *Id.* Mr. Farook asserted that the trial court erred in admitting as evidence against him privileged and confidential testimony from his former counsel, Mr. Davis, and that absent this evidence, the State could not carry its burden in explaining or excusing the over six-year delay in his case. According to Mr. Farook, the weight of the evidence as applied to each of the *Barker* factors tipped the scales in his favor and entitled him to relief from his convictions. *Farook*, 274 N.C. App. at 85.

¶ 15 A unanimous Court of Appeals held that Mr. Farook had been deprived of his right to a speedy trial, reversed the trial court's denial of his motion to dismiss, and vacated his convictions. *Id.* at 88. The court undertook an analysis of each *Barker* factor in reasoning that he was entitled to relief. First, the court concluded that the six-year delay in the case was sufficient to create a presumption of prejudice to Mr. Farook to "trigger the *Barker* inquiry," thereby shifting the burden to the State to rebut the presumption and assign reasons for the delay. *Id.* at 76–77.

¶ 16 Second, the court concluded that the State failed to meet its burden in explaining the inordinate delay in the case. *Id.* at 87. It held that the trial court erred in allowing Mr. Davis to testify against Mr. Farook as the State's sole rebuttal witness concerning the reason for the delay. *Id.* at 84. In the court's view, Mr. Davis divulged privileged information, and Mr. Farook neither tacitly nor expressly waived the attorney-client privilege. *Id.* The court further reasoned that even if Mr. Davis's mental impressions, conclusions, opinions, and legal theories in connection with his defense of Mr. Farook were work product, those would nevertheless be similarly privileged and inadmissible as evidence. *Id.* The panel also acknowledged that neither the State nor the trial court made any attempt to limit Mr. Davis's testimony concerning the delay to public information such as court calendars or Mr. Davis's caseload and explained that even if Mr. Davis adopted a trial strategy of delay as the State alleged, Mr. Farook could not have acquiesced to such a strategy if it had not been communicated to him. *Id.* Having discounted all of Mr. Davis's testimony in evaluating the factual allegations raised at the hearing on defendant's motion to dismiss, the Court of Appeals concluded that under the totality of circumstances, the trial court committed plain error when it admitted privileged testimony as competent rebuttal evidence and improperly relied on the testimony to support its ruling on the motion to dismiss. *Id.* at 84–85.

¶ 17 Third, the court addressed whether Mr. Farook sufficiently asserted his right to a speedy trial. It diverged from the trial court's finding that Mr. Farook did not appropriately assert his right to a speedy trial on

the grounds that the trial court's analysis of this factor was improperly influenced by Mr. Davis's testimony. *Id.* at 87. In addition, the Court of Appeals noted that Mr. Farook otherwise requested information about his case and filed a pro se motion to dismiss during its pendency. *Id.* Finally, the Court of Appeals held that Mr. Farook was prejudiced by the undue delay in the case which impacted his ability to adequately prepare a defense to the charges against him. *Id.* at 87–88.

¶ 18 On 10 March 2021, we allowed the State's petition for discretionary review to consider whether the Court of Appeals correctly held that the trial court plainly erred in admitting privileged and confidential testimony from Mr. Davis and whether the Court of Appeals properly applied the *Barker* test in evaluating Mr. Farook's speedy trial claim.

III. Standard of Review

¶ 19 This Court reviews decisions of the Court of Appeals for errors of law. N.C. R. App. P. 16(a); *State v. Melton*, 371 N.C. 750, 756 (2018). The denial of a motion to dismiss on speedy trial grounds presents a constitutional question of law subject to de novo review. *State v. Williams*, 362 N.C. 628, 632–33 (2008).

IV. Analysis

A. The trial court plainly erred when it admitted privileged testimony from Mr. Davis as evidence against Mr. Farook at the hearing on defendant's motion to dismiss.

¶ 20 **[1]** To prove a speedy trial violation, a criminal defendant must first show that the length of the delay in his case is so presumptively prejudicial that it warrants a full constitutional review of his claim under *Barker*. *State v. Farmer*, 376 N.C. 407, 415 (2020). The length of the delay is considered a triggering mechanism that either instigates or obviates the need to conduct the full *Barker* analysis. *See Barker*, 407 U.S. at 530 ("Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance."). If the rest of the inquiry is triggered, the length of delay functions independently as a factor to be weighed alongside the remaining three factors. *Id.*; *see also State v. Spivey*, 357 N.C. 114, 119 (2003).

¶ 21 The length of delay is not per se determinative of whether a defendant has been deprived of his right to a speedy trial. *See State v. Webster*, 337 N.C. 674, 678 (1994). Although there is no specific duration that constitutes a delay of constitutional dimension, delays that exceed one year have been considered "presumptively prejudicial," signaling the point at which courts deem the delay unreasonable enough to

trigger the *Barker* calculus. *See Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992) (recognizing that post-accusation delay is presumptively prejudicial at least as it approaches one year); *Webster*, 337 N.C. at 679 (delay of sixteen months triggered examination of other factors); *State v. Pippin*, 72 N.C. App. 387, 392 (1985) (delay of fourteen months prompted consideration of *Barker* factors); *State v. McCoy*, 303 N.C. 1, 12 (1981) (delay of eleven months was not presumptively prejudicial for a murder case). When the accused makes this showing, the burden of proof "to rebut and offer explanations for the delay" shifts to the State. *See State v. Wilkerson*, 257 N.C. App. 927, 930 (2018).

¶ 22 Here, the trial court failed to recognize the presumption of prejudice to Mr. Farook created by the over six-year delay in his case before undertaking its review of the other *Barker* factors. Mr. Farook was incarcerated for 2,302 days — six years and three months — without a trial. As we have routinely held, and as the Court of Appeals correctly noted, as a delay approaches one year, it is generally recognized as long enough to create a "prima facie showing that the delay was caused by the negligence of the prosecutor." *Wilkerson*, 257 N.C. App. at 930 (quoting *State v. Strickland*, 153 N.C. App. 581, 586 (2002)). Indeed, a delay of over six years is "extraordinarily long," "striking," and "clearly [sufficient to] raise[ ] a presumption that defendant's constitutional right to a speedy trial may have been breached." *Farmer*, 376 N.C. at 414.

¶ 23 Our decision in *McCoy*, in which we held that an eleven-month delay was not presumptively prejudicial for *Barker* purposes, casts no shadow on our conclusion in this case. *See McCoy*, 303 N.C. at 12. The delay in this case far surpasses the eleven-month delay at issue in *McCoy*. Indeed, "the presumption that pretrial delay has prejudiced the accused intensifies over time." *Doggett*, 505 U.S. at 652. The over six-year delay in this case must therefore be considered unreasonable and presumptively prejudicial within the meaning of the Sixth Amendment and is clearly sufficient to shift the burden of proof to the State "to rebut and offer explanations for the delay." *See Wilkerson*, 257 N.C. App. at 930.

¶ 24 The only evidence presented by the State to rebut the presumption of the unreasonableness of the delay in this case was the challenged testimony offered by Mr. Farook's former attorney, Mr. Davis. The *Barker* Court explained that different weights should be assigned to various reasons for delay:

> A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such

> as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered . . . . Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Barker, 407 U.S. at 531 (footnote omitted).

¶ 25 Consistent with that explanation, *Barker* recognizes four categories of reasons for delay: (1) deliberate delay on the part of the State, (2) negligent delay, (3) valid delay, and (4) delay attributable to the defendant. 407 U.S. at 531. Although establishing a violation of the speedy trial right does not require proof of an improper prosecutorial motive, because the Sixth Amendment speedy trial guarantee is itself indicative that delay is often detrimental to the criminal defendant, deliberate delay is "weighted heavily" against the State. *Id.* Deliberate delay includes an "attempt to delay the trial in order to hamper the defense[,]" *id.* at 531, or "to gain some tactical advantage over [a defendant] or to harass them[,]" *id.* at 531 n.32 (quoting *United States v. Marion*, 404 U.S. 307, 325 (1971)); *see also Pollard v. United States*, 352 U.S. 354, 361 (1957).

¶ 26 A more neutral reason such as negligent delay or a valid administrative reason such as the complexity of the case or a congested court docket is weighted less heavily against the State than is a deliberate delay. *Barker*, 407 U.S. at 531. However, the fact that the State did not act maliciously in delaying the case does not absolve the State of its responsibility to bring a criminal defendant to trial within a reasonable period. *Id.* Appropriately, such neutral circumstances do not necessarily excuse delay and speedy trial claims nevertheless should be considered when there is a neutral reason for the delay, "since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Id.*; *see also State v. Smith*, 289 N.C. 143, 148–49 (1976) (holding that an eleven-month delay caused by overcrowded court dockets and difficulty in locating witnesses was acceptable); *State v. Hughes*, 54 N.C. App. 117, 119 (1981) (holding that no speedy trial violation occurred when reason for delay was congested dockets and a policy of giving priority to jail cases).

¶ 27 A valid reason for delay, such as delay caused by difficulty in locating witnesses, serves to justify appropriate delay. *Barker*, 407 U.S. at 531. Finally, delays occasioned by acts of the defendant or on his or her behalf are heavily counted against the defendant and will generally defeat his or her speedy trial claim. *See Vermont v. Brillon*, 556 U.S. 81, 89, 94 (2009) (holding that delay caused by defendant's counsel is not attributable to the State and defendant's "deliberate attempt to disrupt

proceedings" was weighted heavily against him); *see also State v. Groves*, 324 N.C. 360, 366 (1989) (holding that no speedy trial violation occurred when defendant repeatedly requested continuances); *State v. Tindall*, 294 N.C. 689, 695–96 (1978) (holding that no speedy trial violation occurred when the delay was caused largely by the defendant absconding from the jurisdiction and living under an assumed name); *Pippin*, 72 N.C. App. at 394 (holding that a speedy trial claim does not arise from delay attributable to defense counsel's requested plea negotiations).

¶ 28 The State asserted below, as it does before this Court, that the overlong delay in this case was caused by Mr. Farook's repeated requests for changes in representation and his acquiescence to Mr. Davis's strategy of delay, both of which it argued must weigh against Mr. Farook in the balance. At the hearing on Mr. Farook's motion to dismiss, Mr. Davis testified that Mr. Farook faced new criminal charges after plea negotiations with the State had failed. The State asked Mr. Davis if he strategized to delay the case once it became clear Mr. Farook would possibly face a violent habitual felon indictment. Mr. Davis answered in the affirmative, avowing that in his experience, delay would work to Mr. Farook's advantage. Mr. Davis testified as follows:

> Q. Now, would you — would you — would it be fair to say that that was a strategic decision in delaying the case from that point based on the discussions of the violent habitual felon?
>
> A. Of course. It's sort of the nature of trial practice, and again, I teach trial practice. Early on, victims are angry, prosecutors are sometimes motivated. Cases almost always get worse for the State over time.
>
> Witnesses leave. Evidence gets lost. Officers retire. I've had — I've done a tremendous number of jury trials. Probably well in excess of a hundred.
>
> Many of them very serious trials, and one of the recurrent themes of jurors is, "Where were these witnesses? Why did the State wait so long?" It greatly diminishes the — the power of the State's case. So, yes, because there were no labs, because people were angry, because the prosecutor was very interested in going after Mr. Farook with the violent habitual felon, all of those dynamics were part of my trial strategy and letting things cool down.

¶ 29 Mr. Davis also attempted to rationalize the delay in Mr. Farook's case through his general testimony about the burdened Rowan County court dockets. During cross-examination, he noted that while he was Mr. Farook's counsel, "at no time" had the case been on a trial calendar, only administrative calendars. Furthermore, Mr. Davis explained that he was under pressure to meet strict deadlines in one case, was "under the gun" with his normal caseload, and had "at least two pending pressing murders." Mr. Davis also emphasized that he told Mr. Farook to request new counsel owing to the prospect that he would be unavailable to represent Mr. Farook at trial "for a year or longer" because he "couldn't even consider [representing Mr. Farook at trial] for a long time." Indeed, Mr. Davis testified about his representation of Mr. Farook, his trial strategy, and the administrative difficulties that plagued the Rowan County courts. Each of these buckets of testimony is significant in analyzing whether Mr. Davis's testimony was improperly admitted. The testimony should have been excluded if it revealed information protected by the attorney-client privilege. *See Sims v. Charlotte Liberty Mut. Ins. Co.*, 257 N.C. 32, 36 (1962) (explaining that if evidence is held to be privileged it is therefore inadmissible).

¶ 30 "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The privilege functions for the public benefit by encouraging clients to communicate with their attorneys freely and fully, fostering the provision of competent legal advice, facilitating the ends of justice, and outweighing the harm that may result from the loss of relevant information. Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence Manual* § 18.03[1] (Joseph M. McLaughlin ed., Matthew Bender 2014). For the privilege to apply and thus require the exclusion of relevant evidence, "the relation of attorney and client [must have] existed at the time the [particular] communication was made." *In re Miller*, 357 N.C. 316, 335 (2003) (quoting *State v. McIntosh*, 336 N.C. 517, 523 (1994)).

¶ 31 However, the mere fact that an attorney-client relationship exists does not automatically trigger the attorney-client privilege: the communication sought to be shielded from publication must be confidential. *See Dobias v. White*, 240 N.C. 680, 684 (1954) (noting that simply because "the evidence relates to communications between attorney and client alone does not require its exclusion" because such communications must also be confidential); *see also McIntosh*, 336 N.C. at 523; *State v. McNeill*, 371 N.C. 198, 240 (2018). At common law, "confidential communications made to an attorney in his professional capacity by his

client are privileged, and the attorney cannot be compelled to testify to them unless his client consents." *Dobias*, 240 N.C. at 684.

> A privilege exists if (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated[,] and (5) the client has not waived the privilege.

State v. Murvin, 304 N.C. 523, 531 (1981). The party asserting the privilege has the burden of establishing each of the essential elements of the privileged communication. *Id.* at 532.

1. Standard of review for unpreserved evidentiary errors

¶ 32 Mr. Davis did not assert the attorney-client privilege or work-product privilege at the hearing on his speedy trial motion. And despite being represented by Mr. Sease at the hearing, there was no objection made on Mr. Farook's behalf to any of Mr. Davis's testimony. Unpreserved evidentiary errors are reviewed by this Court for plain error. *See State v. Lawrence*, 365 N.C. 506, 516 (2012) ("[T]he North Carolina plain error standard of review applies only when the alleged error is unpreserved, and it requires the defendant to bear the heavier burden of showing that the error rises to the level of plain error."). To demonstrate plain error, Mr. Farook must also "establish . . . that, after examination of the entire record," the error had a probable impact on the trial court's decision to deny Mr. Farook's motion to dismiss. *Lawrence*, 365 N.C. at 518 (holding that plain error requires defendant to show the error had a probable impact on the jury's finding that defendant was guilty).

2. The testimonial evidence contained information that was protected by the attorney-client privilege.

¶ 33 We hold that under *Murvin*, the Court of Appeals correctly decided that the attorney-client privilege attached to Mr. Davis's testimony concerning his representation of Mr. Farook, which included both the testimony about his decision to engage in delay and any communications Mr. Davis had with Mr. Farook regarding his decision that flowed therefrom.

¶ 34 First, the attorney-client relationship existed between Mr. Davis and Mr. Farook. Second, all such communications between Mr. Davis and Mr. Farook were made in confidence. Nowhere in the transcript of

Mr. Davis's testimony did Mr. Davis indicate that he communicated his delay strategy in the presence of anyone other than Mr. Farook either directly or indirectly through other attorneys from his office who, acting as Mr. Davis's agents, met with Mr. Farook when Mr. Davis was busy. Specifically, Mr. Davis testified that he sent these attorneys "to routinely make contact with [Mr. Farook]" when he was preoccupied with his other duties as an attorney. It is beyond dispute that the attorney-client privilege also extends to an attorney's agents. *See Murvin*, 304 N.C. at 531 ("Communications between attorney and client generally are not privileged when made in the presence of a third person who is not an agent of either party."). Necessarily, then, the communications at issue related to a matter about which Mr. Davis was professionally consulted and were made in the course of giving Mr. Farook legal advice for a proper purpose.

¶ 35 The State emphasizes the last element under the *Murvin* test, namely, that the attorney-client privilege was waived. According to the State, assuming its existence, Mr. Farook waived the attorney-client privilege by filing his speedy trial motion. However, as the Court of Appeals explained, to demonstrate that Mr. Farook went along with Mr. Davis's trial strategy, and thus that Mr. Farook was the cause of the delay, the State relied upon privileged communications between Mr. Farook and his attorney. The State has failed to demonstrate any exception that would allow the admission of testimony containing such privileged information absent a waiver.

¶ 36 The dissent insists that Mr. Farook waived the protections afforded by the attorney-client privilege concerning Mr. Davis's trial strategy testimony when, in Mr. Farook's pro se motion alleging that Mr. Davis rendered IAC, Mr. Farook asserted that he never agreed to a strategic delay of his trial. In the dissent's view, this declaration in Mr. Farook's IAC motion waived any privilege that may have otherwise applied to Mr. Davis's trial strategy testimony because (1) the declaration constituted a third-party disclosure which was relevant to Mr. Davis's representation of Mr. Farook and (2) it was a declaration Mr. Davis had the authority to respond to under Rule 1.6(b) of the North Carolina Rules of Professional Conduct. The dissent further contends that pursuant to N.C.G.S. § 15A-1415(e), such a waiver of the attorney-client privilege was automatic upon the filing of Mr. Farook's IAC motion, and that being so, the trial court was not required to acknowledge the waiver of attorney-client privilege nor preclude Mr. Davis from testifying to information that was no longer protected by the privilege. This argument ignores long-standing precedent of this Court which establishes that it

is proper, as happened here, for a trial court to disregard motions filed pro se by represented defendants. *See, e.g.*, *State v. Williams*, 363 N.C. 689, 700 (2009) ("Having elected for representation by appointed defense counsel, defendant cannot also file motions on his own behalf. … Defendant was not entitled to file pro se motions while represented by counsel.") (quoting *State v. Grooms*, 353 N.C. 50, 61 (2000) (citations omitted), *cert. denied*, 534 U.S. 838, 122 S. Ct. 93, 151 L. Ed. 2d 54 (2001). Moreover, the argument also rests on a misinterpretation and misapplication of the statute governing IAC claims.

¶ 37 At the outset, it should be noted that the State did not make this argument before the trial court, the Court of Appeals, or this Court. It has been the rule in this Court, at least since 1934, that "[a] party has no right to appear both by himself and by counsel. Nor should he be permitted ex gratia to do so." *Abernethy v. Burns*, 206 N.C. 370, 370-71 (1934). As we said in *State v. Parton*, "[i]t has long been established in this jurisdiction that a party has the right to appear in propria persona or, in the alternative, by counsel. There is no right to appear both in propria persona and by counsel." *State v. Parton*, 303 N.C. 55, 61 (1981). In *State v. Williams*, this principle was the basis for our holding that it was impermissible for the defendant in that case, who was represented by court-appointed counsel, to file a pro se motion to dismiss on speedy trial grounds. *State v. Williams*, 363 N.C. at 700 ("Defendant was represented by appointed counsel and was not allowed to file pro se motions on his behalf.") In this case, Mr. Farook was represented by counsel and was not allowed to file pro se motions. Therefore, such a legal nullity cannot be the basis of any sort of waiver of the attorney-client privilege in these circumstances.

¶ 38 Indeed, the notion that Mr. Farook waived his privilege here is contrary to the statute governing IAC claims.

¶ 39 Subsection 15A-1415(e) provides that the filing of a motion for IAC

> waive[s] the attorney-client privilege with respect to both oral and written communications between such counsel and the defendant to the extent the defendant's prior counsel reasonably believes such communications are necessary to defend against the allegations of ineffectiveness. This waiver of the attorney-client privilege shall be automatic upon the filing of the motion for appropriate relief alleging ineffective assistance of prior counsel, and the superior court need not enter an order waiving the privilege.

N.C.G.S. § 15A-1415(e) (2021). As with all statutes, in interpreting N.C.G.S. § 15A-1415(e) we must look to the intent of the legislature, *State v. Tew*, 326 N.C. 732, 738 (1990), and give meaning to all its provisions. *State v. Bates*, 348 N.C. 29, 35 (1998). "Individual expressions must be construed as a part of the composite whole and be accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit." *Tew*, 326 N.C. at 739.

¶ 40 While under N.C.G.S. § 15A-1415(e) the waiver of the attorney-client privilege is automatic upon the filing of a motion alleging IAC with respect to certain information, the statute also provides that the automatically waived communications between a defendant and his attorney are only waived "*to the extent the defendant's prior counsel reasonably believes such communications are necessary to defend against the allegations of ineffectiveness*." N.C.G.S. § 15A-1415(e) (emphasis added). Thus, the italicized clause is a limitation on the context within which the automatic waiver relating to IAC filings is operative. The waiver of certain information has force only to the extent that the information is disclosed when a defendant's attorney "reasonably believes" such disclosure is "necessary to defend against the allegations of ineffectiveness." *See* N.C.G.S. § 15A-1415(e).

¶ 41 The fact that by statute the waiver is deemed automatic upon the filing of a motion alleging an IAC claim does not mean that the scope of the waiver knows no bounds. On the contrary, the statute's use of the "to the extent" expression places a statutory limit on the contexts in which the waived information is available for disclosure. Moreover, the statute contains no express provision for expanding the scope of the waiver beyond the context of the IAC claim. *See also*, *State v. Buckner*, 351 N.C. 401 (2000) (holding that N.C.G.S. § 15A-1415(e) permitted only the discovery of privileged information relevant to the specific IAC claim being litigated).

¶ 42 In this case, Mr. Farook's pro se IAC filing was a legal nullity and never litigated. Consistent with the limiting language in N.C.G.S. § 15A-1415(e), such information, even if waived, was only admissible *to defend against* Mr. Farook's claim of ineffective representation, which necessarily requires that the IAC claim be properly before the trial court. However, it was not.

¶ 43 While the objective and subjective mental processes of Mr. Davis and his communications with Mr. Farook regarding a strategic decision to delay his case may be relevant to the effectiveness of Mr. Davis's representation, pursuant to N.C.G.S. § 15A-1415(e) such information

must also be reasonably *necessary in defending* against an IAC claim. Privileged materials are not subject to the automatic waiver if: (1) they do not concern any matter contested in the IAC proceeding or (2) there is no IAC claim being litigated. Furthermore, N.C.G.S. § 15A-1415(e) cannot be read to imply a waiver of the attorney-client privilege upon the filing of a speedy trial motion, nor can a defendant be required to forfeit one constitutional right as a condition of asserting another. *State v. White*, 340 N.C. 264, 274 (1995) ("A defendant cannot be required to surrender one constitutional right in order to assert another." (citing *Simmons v. United States*, 390 U.S. 377, 394 (1968))); *see also State v. Diaz*, 372 N.C. 493, 500 (2019).

¶ 44 In addition, while Mr. Davis's testimony concerning trial strategy was inadmissible as evidence, the testimony regarding his professional obligations and the backlog of cases that plagued the Rowan County courts was admissible, non-privileged testimony about which Mr. Davis had personal knowledge. Nevertheless, the trial court's order indicates that Mr. Farook's motion to dismiss was denied based in part on the court's reliance on *all* of Mr. Davis's testimony. We therefore leave it to the trial court on remand to reweigh this admissible evidence independently.

¶ 45 The State alternatively contends that Mr. Farook acquiesced to the delay because of his requests for changes in representation. However, even if changes to Mr. Farook's counsel prolonged the pendency of this case, it may be of no constitutional significance if those changes were warranted and necessary. For example, if Mr. Bingham — Mr. Farook's third attorney in the case — withdrew from his role as Mr. Farook's counsel because he had a conflict of interest, any delay that resulted from his withdrawal was warranted and should not be attributable to, nor held against, Mr. Farook. Additionally, any delay that could be imputed to Mr. Farook because of his requests for changes in counsel would only explain part of the delay in a case that spanned over six years — a case that remained pending because the State did not call the case for trial when it had the opportunity to do so on at least *nine* separate occasions over the years. The trial court acknowledged that Mr. Bingham "was almost immediately appointed" when Mr. Farook sought substitute counsel in 2017, but the court did not explain whether the change in counsel in 2017 weighed against Mr. Farook when it decided the State did not intentionally delay the case. On remand, the trial court can evaluate what weight, if any, should be given to this fact in assigning responsibility for the delay in this case.

¶ 46 Lastly, the State argues that the Court of Appeals improperly expanded the scope of the attorney-client privilege. However, the Court

of Appeals acknowledged that if Mr. Davis's testimony regarding court calendars in Rowan County and his other obligations as an attorney was not privileged, the trial court could have limited his testimony to this non-privileged information. *Farook*, 274 N.C. App. at 84. Additionally, the State could have presented testimony from the clerk of court or a prosecutor regarding the court's docket and its explanation for the failure to call Mr. Farook's case for trial. *Id.* at 78. For whatever reason, the trial court and the State did neither.

¶ 47 Applying the *Murvin* test to the facts of this case, Mr. Farook has established that the trial court's erroneous admission of privileged testimony was plain error. The trial court relied on Mr. Davis's testimony in weighing the reason-for-delay factor against Mr. Farook and in favor of the State.[2] The court summed up the reasons for the delay as administrative encumbrances such as "the extensive backlog in Superior Court cases." Further, the court found that the State had taken no actions to deliberately delay the trial, had not been negligent in bringing the case to trial, and that Mr. Farook contributed to the delay through acquiescence. Because Mr. Davis was the State's only witness from which this evidence was drawn out, then necessarily, these conclusions can only be based on his testimony. Thus, the erroneous admission of this evidence, and the trial court's reliance thereon, "seriously affect[ed] the fairness [and] integrity" of the judicial proceeding and had a probable impact on its decision to deny the motion to dismiss. *Lawrence*, 365 N.C at 515 (first alteration in original) (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)).

¶ 48 The trial court's conclusion, in conjunction with the weight it accorded to the other factors, resulted in the denial of Mr. Farook's speedy trial claim. We therefore hold that the trial court plainly erred in allowing Mr. Davis to testify to privileged communications and confidential trial strategy. On remand, the court is free to consider any other competent evidence the State may offer relevant to the reasons for the delay of the trial in this case. And having found that sufficient time elapsed between Mr. Farook's arrest and his trial, and thus that the *Barker* test

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2. To the extent that the dissent is contending that privileged information concerning conversations between Mr. Farook and his attorney is discoverable and admissible because otherwise, the State would have difficulties proving that defense counsel had an impermissible strategy of delay, that argument would virtually eliminate the privilege. It simply cannot be correct that because the attorney-client privilege makes it difficult to show delay, the privilege can be abandoned. Such a rule would allow the State to call defense counsel to testify about what the defendant said about the underlying facts of the case, any time such testimony would make the State's case easier to prove.

is implicated, on remand the trial court must also independently weigh the length of the delay among the other factors. The longer the delay, the more heavily this factor weighs against the State. *See Farmer*, 376 N.C. at 414, 416 (holding that a delay of five years, two months, and twenty-four days was extraordinarily long and weighed against the State); *Doggett*, 505 U.S. at 657–58 (holding that a delay of more than eight years required relief).

B. Under the *Barker* test, the trial court misapplied the proper standard for evaluating prejudice to defendant resulting from the delay.

¶ 49 **[2]** To assess whether the defendant has suffered prejudice from the delay in bringing his case to trial, courts should analyze three interests identified by the *Barker* Court that are affected by an unreasonable delay: (1) oppressive pretrial incarceration; (2) the social, financial, and emotional strain and anxiety to the accused of living under a cloud of suspicion; and (3) impairment of the ability to mount a defense to the charges pending against the defendant. *Barker*, 407 U.S. at 532; *see also Webster*, 337 N.C. at 680–81; *Farmer*, 376 N.C. at 418 (stating that the possibility that the defense will be impaired is the most serious component of *Barker* prejudice). The United States Supreme Court warned in *Barker* that none of the four factors in the balancing scheme are "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial," and further, that because these factors "have no talismanic qualities," they must be considered together with the relevant circumstances set forth in each case. *Barker*, 407 U.S. at 533.

¶ 50 Later, vacating a decision concluding that a showing of actual prejudice is essential, the United States Supreme Court held that this language from *Barker* "expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial." *Moore v. Arizona*, 414 U.S. 25, 26 (1973) (per curiam). In a similar fashion, the Court recognized in *Doggett* that when the delay is inordinate and undue it may be impossible for the defendant to produce evidence of demonstrable prejudice "since excessive delay can compromise a trial's reliability in unidentifiable ways." *Doggett*, 505 U.S. at 648. As a result, the Court recognized in *Doggett* that a lengthy delay coupled with the absence of any rebuttal to the presumption of prejudice created by that delay should result in a finding of prejudice. *Id.* at 658. In *Doggett*, the government protested that the defendant failed to make an affirmative showing that the delay in the case impaired his ability to defend against the charges against him. *Id.* at 655. Though the Court agreed that the defendant did not make such

a showing, it recognized that this argument did not settle the issue. *Id.* at 655–56. Instead, the Court emphasized that actual and particularized prejudice to the defendant is not essential to every speedy trial claim. *Id.* at 655.

¶ 51 *Barker* and its progeny make clear that one of the purposes of the speedy trial guarantee is to protect against those forms of prejudice that are so axiomatic as to require no affirmative proof. *Doggett*, 505 U.S. at 655. The failure to show actual prejudice to the defense is not fatal per se to a speedy trial claim. Thus, "presumptive prejudice" along with the fact that the other factors are found to tip the scales in a defendant's favor may be enough to require dismissal of the charges, especially when there is no justification presented by the government. *See id.* (declaring the defendant had done enough to secure dismissal on speedy trial grounds, recognizing that "excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify"). And as the Court clarifies in *Doggett*, a criminal defendant may establish prejudice for purposes of his speedy trial claim through proof of either actual prejudice or presumptive prejudice. *Id.*

¶ 52 In this case, the trial court misapplied the standard for assessing prejudice in two ways. The trial court first erred in finding that "the State has been significantly prejudiced by the length of the delay." So finding, the trial court misapprehended the *Barker* requirement and improperly identified the State, rather than Mr. Farook, as the prejudiced party. That requirement was, in the trial court's view, met by the prejudice suffered by the State from the six-year delay in bringing the case to trial. In fact, the State has the calendaring authority to set a case for trial. *See Farmer*, 376 N.C. at 412 (demonstrating that the State retains the authority and ability to calendar a case for trial through an acknowledgement that within four months of the *Farmer* defendant's assertion of his right to a speedy trial, his case was calendared and tried); N.C.G.S. § 7A-49.4(a) (2021) (stating that criminal cases in superior court shall be calendared by the district attorney). Furthermore, the Sixth Amendment right to a speedy trial is a right granted to the defendant. *See* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."). The speedy trial guarantee is a constitutionally granted shield against unreasonably sluggish prosecutorial conduct that is oppressive to the defendant and hostile to the fair administration of justice.

¶ 53 Second, the trial court erred in concluding that the prejudice factor weighed decisively against Mr. Farook because he did not prove actual prejudice. As we have emphasized, the trial court may not find

that a criminal defendant's speedy trial claim is doomed merely because he does not demonstrate actual prejudice. On remand, the trial court should assess the extent to which Mr. Farook was prejudiced by the delay in this case under the proper standard articulated herein.

V. Conclusion

¶ 54 In *Beavers v. Haubert*, the United States Supreme Court emphasized that a reviewing court's scrutiny of a speedy trial claim depends not on a bright-line rule but is governed by the context and factual circumstances particular to each individual defendant's case. 198 U.S. 77, 87 (1905); *see also Barker*, 407 U.S. at 522. The ad hoc considerations prescribed in *Beavers* reflected the Court's sensitivity to balancing the competing interests of the government and the criminal defendant. No single *Barker* factor is, in itself, either necessary or sufficient to find a violation of the speedy trial right; instead, "they are related factors and must be considered together with such other circumstances as may be relevant." *Barker*, 407 U.S. at 533; *see also Spivey*, 357 N.C. at 118. The *Beavers* Court explained: "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice." *Beavers*, 198 U.S. at 87; *see also State v. Neas*, 278 N.C. 506 (1971). In reviewing speedy trial claims, trial courts must be sensitive to the interests of the State and the defendant, with an eye toward fairness as the *Barker* test compels.

¶ 55 For the reasons set forth above, we remand this case to the Court of Appeals for further remand to the trial court. On remand, the trial court should consider any competent, non-privileged evidence of the reason for the delay in this case. It also must assess the extent to which Mr. Farook asserted his speedy trial right and the extent to which he was prejudiced by the delay in light of the proper standard by which such prejudice is to be determined. Finally, the trial court may receive additional evidence by both parties to establish the necessary quantum of proof on each *Barker* factor to be weighed to determine whether Mr. Farook's Sixth Amendment speedy trial right was abridged such that his motion to dismiss should be granted and his convictions vacated.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Justice BERGER dissenting.

¶ 56 By improperly removing the burden of proof from defendant and placing it squarely on the shoulders of the State, the majority effectively

holds that the mere passage of time entitles a defendant to relief on a motion to dismiss for a purported speedy trial violation. In addition, the majority eliminates the requirement under *Barker* that a defendant demonstrate prejudice caused by the delay. Finally, the majority offers the shelter of privilege to defense counsel's testimony despite the waiver of such privilege by defendant himself. Because defendant waived the attorney-client privilege, failed to prove that delay was attributable to the State, and failed to show prejudice, I respectfully dissent.

¶ 57 On June 17, 2012, defendant killed Tommy and Suzette Jones when defendant crossed the centerline of the road in his vehicle and collided with the couple's motorcycle. A witness to the collision testified that defendant stepped out of his vehicle following the crash, observed the bodies of Mr. and Mrs. Jones, and fled the scene on foot. Defendant was later charged with two counts of felony death by vehicle, felony hit and run resulting in death, driving while impaired, reckless driving to endanger, driving left of center, driving with a revoked license, and resisting a public officer.[1]

¶ 58 Defendant was represented by four different attorneys prior to filing his motion to dismiss for an alleged speedy trial violation in September 2018. Defendant's first attorney, James Randolph, was appointed in July 2012 following defendant's arrest. Soon after, however, on August 6, 2012, Mr. Randolph withdrew as defendant's counsel upon realizing that other members of his law firm were working with the family of the victims.

¶ 59 James Davis, defendant's second attorney, was appointed on or about August 27, 2012. While the majority notes that Mr. Davis was not appointed until December 2014 in its analysis, this date merely reflects when an administrative order of assignment was entered, and use of this date by the majority is contrary to the information in the record. Defendant stated in a pro se motion to dismiss for ineffective assistance of counsel that Mr. Davis was appointed on August 28, 2012. Mr. Davis testified that he was appointed "on or about August 27, 2012" and included this date in his written motion to withdraw. Further, evidence in the record indicates that Mr. Davis received discovery for defendant's case in December 2012 and engaged in discussions with the State regarding defendant's pending violent habitual felon indictment as early as March 2013. An honest review of the record leads to use of the August 27, 2012 date as the date Mr. Davis was appointed as defense counsel.

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1. Defendant was subsequently indicted on two counts of second-degree murder and attaining violent habitual felon status.

This obviously impacts the majority's characterization of the delay attributable to counsel for defendant. While the majority acknowledges in a footnote that there is "some evidence in the record tending to suggest that Mr. Davis began representing Mr. Farook in 2012," the majority nonetheless characterizes the delay attributable to defendant as three years. In reality, delay attributable to Mr. Davis alone was closer to five years.

¶ 60 Mr. Davis entered into plea negotiations with the State; however, he filed a motion to withdraw as defendant's counsel on June 30, 2017, after defendant rejected a plea offer from the State. In other words, when Mr. Davis understood that defendant's case would proceed to trial instead of being resolved through a plea, he sought to withdraw from representation.

¶ 61 In acknowledging this was "a very important case" given it involved a violent habitual felon indictment, Mr. Davis testified that his workload would not allow him to adequately prepare for defendant's trial. Mr. Davis indicated that he could not be prepared for trial until summer 2018, even though the State wanted to calendar the case for trial in 2017. Mr. Davis was permitted to withdraw, and David Bingham was appointed as defendant's third attorney on July 5, 2017. The case was placed on an administrative calendar for August 7, 2017.

¶ 62 On September 11, 2017, defendant filed a pro se "Motion to Dismiss Appointed Attorney" requesting Mr. Bingham be dismissed as defendant's counsel.[2] According to defendant, Mr. Bingham was not looking after defendant's best interests and had informed defendant that he would "be found guilty of all charges."

¶ 63 On September 14, 2017, Mr. Bingham filed a motion requesting that the trial court appoint a private investigator to interview witnesses and to "help [defendant] locate and establish alibi witnesses." There is no indication in the record that any other attorney appointed to represent defendant on these charges had applied for assistance in investigating defendant's case. On September 13, 2017, Mr. Bingham filed a motion to withdraw as counsel for defendant. The trial court entered an order granting Mr. Bingham's motion on September 25, 2017.

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2. There is also a letter in the record from defendant to Mr. Bingham dated August 2, 2017. It is unclear if this letter was sent to the clerk's office or directly to Mr. Bingham. In the letter, defendant informs Mr. Bingham that he wants Mr. Bingham to withdraw from the case and provides Mr. Bingham with a list of three attorneys he would prefer to have appointed to represent him.

¶ 64 On that same day, Chris Sease was assigned as the fourth appointed attorney to represent defendant in this case. Between August 2012 and the time Mr. Sease was appointed, defendant's case was calendared but not reached at least eight times. In further examining this time period, the trial court found that from the time defendant killed Mr. and Mrs. Jones until June 2016, there was "an extensive backlog in Superior Court cases" in Rowan County and "the State [had] tried mostly cases older than [d]efendant's."[3]

¶ 65 Despite representation by Mr. Sease, defendant filed a pro se motion on September 4, 2018, alleging ineffective assistance of counsel and seeking dismissal of the charges against him. The motion stated that Mr. Davis did not speak with or visit defendant in jail for more than four-and-a-half years, from August 2012 until March 2017. Defendant further alleged that the delay by Mr. Davis resulted in prejudice to defendant, and defendant claimed to have "never agreed to the delay of his trial."

¶ 66 On September 13, 2018, defendant filed another pro se motion to dismiss, this time alleging a speedy trial violation and ineffective assistance of counsel. Defendant again alleged Mr. Davis did not speak with him about his case for more than four-and-a-half years and that Mr. Bingham informed defendant that he would be found guilty.

¶ 67 Mr. Sease filed a motion to dismiss for a speedy trial violation on September 18, 2018, and alleged the following:

> 8. That the [d]efendant entered a plea of [n]ot [g]uilty . . . in Superior Court on August 13, 2012.
>
> 9. That the [d]efendant's case was not calendared again until the week of February 18, 2013, almost six months later. Said case was not reached. . . .
>
> 10. That the [d]efendant's case was not calendared for trial again until the week of March 19, 2013. Said case was not reached. . . .
>
> 11. That the [d]efendant's case was not calendared for trial again until the week of April 16, 2013. . . .

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3. This Court recently found that there was no speedy trial violation in another case from Rowan County during this same time period. In *State v. Farmer*, 376 N.C. 407, 412, 852 S.E.2d 334, 339 (2020), Justice Morgan, writing for the majority, weighed the *Barker* factors, including "crowded criminal case dockets," and determined that a delay of five years from 2012 to 2017 of the trial of the defendant's sexual abuse charges did not violate the defendant's constitutional right to a speedy trial.

> 12. That the [d]efendant's case was not calendared again until July 15, 2015, almost 27 months later. Said case was not reached. . . .
>
> 13. That the [d]efendant's case was not calendared again until July 27, 2015. Said case was not reached. . . .
>
> 14. That the [d]efendant's case was not calendared again until February 13, 2017, almost 19 months later. Said case was not reached. . . .
>
> . . . .
>
> 16. That [d]efendant's case was calendared for the week of July 5, 2017. Said case was not reached. . . .
>
> 17. That the [d]efendant's case was not calendared again until August 29, 2017. Said case was not reached. . . .
>
> 18. That the [d]efendant's case was not calendared again until September 26, 2017. Said case was not reached. . . .
>
> 18. [sic] That the case was not calendared until January 8, 2018. Said case was not reached for trial.

¶ 68 Defendant offered no further evidence in support of his contention that his right to a speedy trial had been violated by the State. While defendant's motion does not state the reason defendant's case was not reached on each date, his case was "calendared for trial" at least twice during Mr. Davis's representation. In a section of the order denying defendant's motion to dismiss entitled "Timeline," the trial court stated that "[Mr.] Davis tried approximately 18 jury trials in Rowan County criminal superior [court] between 2013 and 2017 along with countless criminal and civil district court trials. Additionally, during the time [Mr.] Davis represented [d]efendant[,] he represented 7 other defendant[s] charged with first degree murder, some of which are still pending."

¶ 69 Defendant argues, and the majority agrees with the Court of Appeals, that the testimony provided by Mr. Davis, a very experienced trial attorney, disclosed information protected by attorney-client privilege. Additionally, the majority holds that the trial court erred in its application of the *Barker* factors. Both determinations are contrary to existing law.

I. Attorney-Client Privilege

¶ 70 "It is well settled that communications between an attorney and a client are privileged under proper circumstances." *State v. Bronson*, 333 N.C. 67, 76, 423 S.E.2d 772, 777 (1992). In accordance with this privilege, the protection is extended "not only [to] the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Upjohn Co. v. United States*, 449 U.S. 383, 390, 101 S. Ct. 677, 683, 66 L. Ed. 2d 584, 592 (1981). Nevertheless, "the mere fact the evidence relates to communications between attorney and client alone does not require its exclusion." *Dobias v. White*, 240 N.C. 680, 684, 83 S.E.2d 785, 788 (1954). Courts are obligated to strictly construe the attorney-client privilege and limit it to the purpose for which it exists. *State v. Smith*, 138 N.C. 700, 703, 50 S.E. 859, 860 (1905).

¶ 71 Because the privilege is a protection belonging to the defendant, it may be waived by him at any time. *See State v. Tate*, 294 N.C. 189, 193, 239 S.E.2d 821, 825 (1978). For example, a defendant's decision to disclose the substance of communications that would otherwise be privileged to a third party waives confidentiality. *See State v. Fair*, 354 N.C. 131, 168, 557 S.E.2d 500, 525–26 (2001) (finding waiver of attorney-client privilege where defendant presented the substance of the communication to the jury as part of his defense). The rationale behind this type of waiver is indeed a logical one: once a party makes a third-party disclosure, thereby sharing privileged information with someone other than their attorney, the purpose of keeping such information confidential is no longer implicated.

¶ 72 In addition, waiver of the privilege may occur in the context of claims involving the quality of an attorney's representation of a criminal defendant. N.C.G.S. § 15A-1415(e) (2021); *see also* N.C. R. Prof'l Conduct r. 1.6(b) (N.C. State Bar 2017) (authorizing attorneys "to respond to allegations in *any* proceeding concerning the lawyer's representation of the client[.]" (emphasis added)). Subsection 15A-1415(e) provides that the filing of a motion for ineffective assistance of counsel

> waive[s] the attorney-client privilege with respect to both oral and written communications between such counsel and the defendant to the extent the defendant's prior counsel reasonably believes such communications are necessary to defend against the allegations of ineffectiveness. This *waiver of the attorney-client privilege shall be automatic upon the filing* of the motion for appropriate relief

> alleging ineffective assistance of prior counsel, and the superior court need not enter an order waiving the privilege.

N.C.G.S. § 15A-1415(e) (2021) (emphasis added); *see also State v. Buckner*, 351 N.C. 401, 406, 527 S.E.2d 307, 310 (2000) ("[W]aiver of the attorney/client privilege [is] automatic upon the filing of the allegations of ineffective assistance of counsel . . . ."). However, the waiver is limited "to matters relevant to his allegations of ineffective assistance of counsel." *State v. Taylor*, 327 N.C. 147, 152, 393 S.E.2d 801, 805 (1990).

¶ 73 In addressing the State's argument that defendant waived any privilege that might have applied to defense counsel's testimony, the majority here notes that in order to demonstrate defendant "went along with Mr. Davis's trial strategy" of delay, "the State relied upon privileged communications between [defendant] and his attorney." The majority goes on to say that because "[t]he State has failed to demonstrate any exception that would allow admission" of such testimony, the testimony of Mr. Davis is protected. In using this circular reasoning, however, the majority discounts the ineffective assistance of counsel claim filed by defendant and the contents thereof. Moreover, the majority declines to address the fact that defendant failed to object to Mr. Davis's testimony. To the contrary, defendant cross-examined Mr. Davis regarding information which defendant now claims is subject to the attorney-client privilege.

¶ 74 It is uncontested that defendant was in custody for an extended period of time while awaiting trial for killing Mr. and Mrs. Jones. Defendant filed an ineffective assistance of counsel claim alleging the existence of a dilatory strategy that, according to defendant, was unilaterally developed by Mr. Davis. In filing this claim against his previous attorney, defendant launched serious allegations concerning Mr. Davis and the quality of his representation that, based on the majority opinion, may have violated the Rules of Professional Conduct. Defendant's ineffective assistance of counsel claim contained specific allegations of ineffective representation and a voluntary disclosure of privileged information, both of which result in a waiver of the attorney-client privilege.

¶ 75 Defendant's September 4, 2018, ineffective assistance of counsel claim specifically addressed Mr. Davis's strategy in delaying trial to receive a more favorable outcome for defendant. Defendant alleged that his defense counsel "never instructed on speedy trial, or delay o[f] . . . defendant['s] trial[,]" and thus defendant "never agreed to the delay of his trial." The mere filing of this document waived the attorney-client

privilege. N.C.G.S. § 15A-1415(e); *see also Buckner*, 351 N.C. at 406, 527 S.E.2d at 310. To be clear, and as the majority correctly notes, waiver is necessarily limited "to matters relevant to his allegations of ineffective assistance of counsel." *Taylor*, 327 N.C. at 152, 393 S.E.2d at 805. Defendant thus forfeited confidentiality with respect to the apparent five-year delay strategy employed by Mr. Davis. Mr. Davis's testimony during the hearing was directly related to this allegation. Defendant did not object to this testimony, and the trial court was not otherwise required to acknowledge or address the waiver of the attorney-client privilege. *See* N.C.G.S. § 15A-1415(e) (a trial court "need not enter an order waiving the privilege.").

¶ 76 In addition, N.C.G.S. § 15A-1415(e) does not expressly limit the context in which an attorney may address allegations of ineffectiveness, only that "prior counsel reasonably believes [disclosure is] necessary to defend against the allegations of ineffectiveness." N.C.G.S. § 15A-1415(e).

¶ 77 The speedy trial issue is directly related to defendant's claim of ineffective assistance of counsel. Filed only days before the speedy trial hearing, defendant's own pro se motion to dismiss based on a "lack of speedy trial" focused on the alleged inaction by Mr. Davis. Similarly, the motion to dismiss based on a speedy trial violation filed by defendant's counsel discussed the appointment of defendant's various attorneys and the lapse of time leading up to trial. Mr. Davis merely provided an explanation countering the allegations against him and his representation when he testified at the hearing. Mr. Davis obviously believed disclosure was necessary to defend against defendant's assertions of gross violations of the Rules of Professional Conduct, and the nexus between the limited testimony of Mr. Davis and the speedy trial motions is far from the majority's characterization of a "waiver [that] knows no bounds."

¶ 78 The majority holds that the State may be in violation of defendant's right to a speedy trial, not because of any action (or inaction) shown on the part of the State, but rather because the State cannot access evidence relating to defense counsel's strategy of delay. Delay in criminal cases is a common strategy. As Mr. Davis testified, delaying disposition of criminal cases is the "nature of trial practice," and it is in no way unique to this defendant. *See Vermont v. Brillon*, 556 U.S. 81, 90, 129 S. Ct. 1283, 1290, 173 L. Ed. 2d 231, 240 (2009) (acknowledging "the reality that defendants may have incentives to employ a delay as a 'defense tactic,' " as such a delay may " 'work to the accused's advantage' because 'witnesses may become unavailable or their memories may fade' over time." (quoting *Barker v. Wingo*, 407 U.S. 514, 521, 92 S. Ct. 2182, 2187,

33 L. Ed. 2d 101, 111 (1972)). Under the majority's theory, a defendant could initially consent to a delay for strategic purposes, subsequently file a motion to dismiss for a speedy trial violation, and later preclude counsel's testimony concerning the delay strategy on the basis of the attorney-client privilege. We should be particularly concerned with determining whether such an approach was employed by defendant or defense counsel, especially in light of the fact that "[d]ilatory practices bring the administration of justice into disrepute." N.C. R. Prof'l Conduct r. 3.2, cmt. 1.

¶ 79 In addition to waiver under N.C.G.S. § 15A-1415(e), the privilege between attorney and client evaporates the moment such privileged communications are shared beyond that relationship. Based on the record here, defendant voluntarily disclosed to the world that a strategy of delay had been utilized by his attorney without his consent. The content of defendant's motion waived the attorney-client privilege. Even though defendant was represented by counsel, he voluntarily disclosed information related to representation by Mr. Davis.[4] Defendant now invites this Court to reimpose these protections, despite having waived his privilege and having failed to object or otherwise argue the same in the trial court. This is not only an improper application of privilege, but, as discussed below, it directly impacts the *Barker* analysis on defendant's speedy trial claim.

¶ 80 Because there was no error in the admission of Mr. Davis's testimony in the trial court, there can be no plain error.

II. *Barker* Factors

¶ 81 Our nation's highest court has identified four factors that "courts should assess in determining whether a particular defendant has been deprived of his right" to a speedy trial. *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101, 117 (1972). These factors include: (1) the length of delay, (2) the reason for delay, (3) the defendant's assertion of his right to a speedy trial, and (4) whether the defendant was prejudiced as a result. *Id.*; *see also State v. Flowers*, 347 N.C. 1, 27, 489 S.E.2d 391, 406 (1997), *cert. denied*, 522 U.S. 1135, 118 S. Ct. 1094, 140 L. Ed. 2d 150 (1998). In adopting *Barker*'s "permeating principles," this Court has recognized that no one factor is sufficient to show a deprivation of the right, and courts must "engage in a difficult and sensitive

4. The majority's reliance on *State v. Williams*, 363 N.C. 689, 686 S.E.2d 493 (2009), is misplaced. *Williams* simply stands for the proposition that once a criminal defendant is appointed counsel, he or she has no right to a ruling by the court on any pro se motions. *Id.* at 700, 686 S.E.2d at 501. *Williams* does not state or imply that information contained in pro se filings has no legal consequence.

balancing process" that requires analysis of any "circumstances [that] may be relevant." *State v. Farmer*, 376 N.C. 407, 419, 852 S.E.2d 334, 343–44 (2020) (quoting *Barker*, 407 U.S. at 533, 92 S. Ct. at 2193, 33 L. Ed. 2d at 118–19). Ultimately, this allows courts to assess "whether the government or the criminal defendant is more to blame for th[e] delay." *Brillon*, 556 U.S. at 90, 129 S. Ct. at 1290, 173 L. Ed. 2d at 240 (alteration in original) (quoting *Doggett v. United States*, 505 U.S. 647, 651, 112 S. Ct. 2686, 2691, 120 L. Ed. 2d 520, 528 (1992)).

¶ 82 In accordance with this approach, this Court has cautioned that the first factor—the length of delay—is not determinative of whether a defendant has been denied a speedy trial. *State v. Webster*, 337 N.C. 674, 678, 447 S.E.2d 349, 351 (1994). While "lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year," such a finding only instructs that further analysis into the remaining *Barker* factors is appropriate. *Doggett*, 505 U.S. at 652 n.1, 112 S. Ct. at 2691 n.1, 120 L. Ed. 2d at 528 n.1. In other words, a proper *Barker* inquiry merely proceeds to analysis of the remaining factors following a post-accusation delay of more than one year.

¶ 83 As to the second factor—the reason for delay—this Court has consistently held that a "defendant has the burden of showing that the delay was caused by the *neglect or willfulness* of the prosecution." *Farmer*, 376 N.C. at 415, 852 S.E.2d at 341 (quoting *State v. Spivey*, 357 N.C. 114, 119, 579 S.E.2d 251, 255 (2003)); *see also Webster*, 337 N.C. at 679, 447 S.E.2d at 351; *State v. McKoy*, 294 N.C. 134, 141, 240 S.E.2d 383, 388 (1978) ("Thus the circumstances of each particular case must determine whether a speedy trial has been afforded or denied, and the *burden is on an accused who asserts denial of a speedy trial to show that the delay was due to the neglect or wilfulness of the prosecution*." (emphasis added)). This ensures that "[a] defendant who has himself caused the delay, or acquiesced in it, will not be allowed to convert the guarantee [of a speedy trial], designed for his protection, into a vehicle to escape justice." *State v. Johnson*, 275 N.C. 264, 269, 167 S.E.2d 274, 278 (1969).

¶ 84 "Only *after* the defendant has carried his burden of proof by offering *prima facie* evidence showing that the delay was caused by the neglect or willfulness of the prosecution must the State offer evidence fully explaining the reasons for the delay and sufficient to rebut the *prima facie* evidence." *Spivey*, 357 N.C. at 119, 579 S.E.2d at 255 (emphasis added). The analysis into whether a defendant was deprived of a speedy trial is concerned with "purposeful or oppressive" delays on the part of the State, not those that happen in good faith or in the normal course. *Id.* (quoting *Johnson*, 275 N.C. at 273, 167 S.E.2d at 280).

Indeed, neither "a defendant nor the State can be protected from prejudice which is an incident of ordinary or reasonably necessary delay." *Id.* (quoting *Johnson*, 275 N.C. at 273, 167 S.E.2d at 280).[5]

¶ 85 The trial court denied defendant's motion to dismiss, concluding that his right to a speedy trial had not been violated. The trial court correctly found that the length of delay in defendant's case was not determinative but that delay merely triggered further examination of the *Barker* factors. The trial court went on to find specifically that

> the State had an extensive backlog in Superior Court cases. From the week of July 2nd, 2012 through June 27th, 2016 the State tried mostly cases older than [d]efendant's case . . . . In the instant case, law enforcement found blood on the driver's side airbag of the Saturn Sedan involved in the crash. The airbag, along with a cheek swab of [d]efendant's DNA was sent to the State Crime Lab for analysis. The State even filed a rush request in attempts to have the State Crime Lab conduct the DNA analysis more quickly. The DNA report was returned approximately three years after the date of offense. This delay is all consistent with a good-faith delay allowing the State to gather evidence "which [was] reasonably necessary to prepare and present its case." *Johnson*, 27[5] N.C. at 273, 167 S.E.2d at 280.

¶ 86 Once DNA testing had been completed, prosecutors and Mr. Davis began discussing disposition of the case and scheduling. Calendaring the case was difficult due to the backlog in Rowan County. This backlog led to a request by the State to secure the assistance of the North Carolina Conference of District Attorneys. Defendant refused to accept a plea offered by the State, and subsequently, defendant was indicted on additional charges. Upon defendant's rejection of the plea, Mr. Davis chose to withdraw due to his workload.

¶ 87 Mr. Bingham was then appointed. He withdrew as counsel for defendant "within three months" of being appointed after defendant requested the change in counsel. It was defendant's actions here that the trial court determined "delay[ed] the case further."

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5. This is contrary to the majority's suggestion that only a defendant can be prejudiced and that it was error under *Barker* for the trial court to conclude that "the State has been significantly prejudiced by the length of the delay." As our caselaw instructs, a finding of prejudice to the State is not a "misapprehen[sion] [of] the *Barker* requirement[s]" nor an "improper[ ] identifi[cation]" by a trial court as the majority contends.

¶ 88 After Mr. Sease, defendant's fourth attorney, was appointed in September 2017, scheduling orders were entered. The trial court found that "[d]efendant never objected or even asked for a sooner trial date[,]" and, in fact, he "consented to his trial date."

¶ 89 The trial court ultimately concluded that the second *Barker* factor weighed against defendant, finding that the delays in defendant's case were reasonable and that defendant failed to prove that "the State acted negligently or willfully in delaying [d]efendant's trial."

¶ 90 Regarding the third factor, the trial court determined that defendant had failed to file a demand for a speedy trial and that his motion to dismiss for an alleged speedy trial violation was filed only one week before the actual trial of his case. Thus, the trial court determined that the third factor—assertion of the right by defendant—"weighs heavily against [d]efendant's claim."

¶ 91 Fourth and finally, as to the prejudice factor, the trial court found that

> [d]efendant does not allege that he has suffered from increased anxiety or concern. In addition, there has been no evidence as to how his incarceration has resulted in loss of witnesses or his ability to prepare a defense for his case.[6] *In actuality, the State has been significantly prejudiced by the length of the delay.* Many of the State's witnesses have retired from law enforcement and civilian witnesses have moved and changed phone numbers. Two witnesses that would have significantly helped the State are unable to be located. . . . Even though [d]efendant has been incarcerated, [d]efendant has actually benefitted from the time elapsed in regards to the State's evidence against him at trial.

(Emphasis added.)

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6. The failure of defendant's four attorneys to secure an investigator for more than five years certainly must be a circumstance overlooked by the majority. *See Vermont v. Brillon*, 556 U.S. 81, 91, 129 S. Ct. 1283, 1291, 173 L. Ed. 2d 231, 241 (2009) (noting that it was error to "attribut[e] to the State delays caused by the failure of several assigned counsel to move [his] case forward" (cleaned up)). Thus, it is improper to attribute to the State delays caused by the failure of defendant's counsel to investigate and locate any other potential witnesses to move defendant's case forward. It is worth noting that the witnesses defendant intended to call at trial were family members who were readily available.

¶ 92 Based on the trial court's findings, defendant's motion to dismiss for a speedy trial violation was denied. In citing to this Court's decision in *State v. Grooms*, 353 N.C. 50, 62, 540 S.E.2d 713, 724 (2000), the trial court here correctly identified that the "burden is on an accused" to demonstrate that the State was the reason for the delay. While the trial court did not directly acknowledge the lack of evidence provided by defendant, the trial court nonetheless correctly concluded that "[t]here has been no showing how the State acted negligently or willfully in delaying [d]efendant's trial" based on a comprehensive analysis of the record. The majority makes the same error as the Court of Appeals and assumes the role of factfinder, summarily rejecting any possibility that the delay resulted from defendant.

¶ 93 Despite clear precedent instructing that "we do not determine the right to a speedy trial by the calendar alone," *State v. Wright*, 290 N.C. 45, 51, 224 S.E.2d 624, 628 (1976), the majority here does just that. The majority effectively concludes that the length of time between defendant's arrest and his motion to dismiss is all the evidence necessary to suggest that the delay was a result of the State's willful or negligent acts. To be clear, defendant presented no evidence to demonstrate willfulness or negligence by the State despite the burden of proof at that juncture resting solely with him. *See Spivey*, 357 N.C. at 119, 579 S.E.2d at 255.

¶ 94 In *Spivey*, this Court examined an alleged speedy trial violation where the defendant had been held in custody pretrial for approximately four-and-a-half years. The defendant argued only that "because over four and one-half years elapsed between his arrest and trial, he was denied his constitutional right to a speedy trial." 357 N.C. at 118, 579 S.E.2d at 254. This Court, in looking at the first prong of the *Barker* analysis, noted that a delay exceeding one year "does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* inquiry." *Id.* at 119, 579 S.E.2d at 255 (quoting *Doggett*, 505 U.S. at 652 n.1, 112 S. Ct. at 2691 n.1, 120 L. Ed. 2d at 528 n.1). This Court clearly stated that the length of delay was enough only to "trigger examination of the other factors." *Id.* Put differently, the length of delay simply moved the inquiry to step two. *Id.* This Court ultimately concluded that despite this delay, defendant had not shown that his constitutional right had been violated. *Id.* at 123, 579 S.E.2d at 257.

¶ 95 More recently, this Court in *Farmer* found that a delay of more than five years was not a violation of the defendant's constitutional right to a speedy trial. *Farmer*, 376 N.C. at 419–20, 852 S.E.2d at 343–44. In looking at the individual factors of the *Barker* analysis, this Court correctly

noted that the first factor merely operated as a "triggering mechanism" compelling further analysis of the remaining *Barker* factors. *Id.* at 414–15, 852 S.E.2d at 341. In writing for the majority, Justice Morgan pointed out that until a notable delay occurs, "there is no necessity for inquiry into the other factors that go into the balance." *Id.* at 415, 852 S.E.2d at 341 (quoting *Barker*, 407 U.S. at 530, 92 S. Ct. at 2192, 33 L. Ed. 2d at 117).

¶ 96 The majority here, however, relies on nonbinding caselaw from the Court of Appeals to conclude that the delay here shifts "the burden of proof [to the State] 'to rebut and offer explanations for the delay.' " Curiously, despite stating that this holding is one that this Court "ha[s] routinely held," the only citation found in the majority opinion supporting their burden shifting scheme is *State v. Wilkerson*, 257 N.C. App. 927, 810 S.E.2d 389 (2018). This is telling in and of itself. In relying on *Wilkerson*, the majority ignores this Court's precedent in *Spivey* and *Farmer*. Neither *Spivey* nor *Farmer* mention the burden shifting scheme announced by the majority today. "The only possible conclusion from the majority's silence on [*Spivey* and *Farmer*] is that these cases remain good law." *State v. Crompton*, 380 N.C. 220, 868 S.E.2d 48, 2022-NCSC-14, ¶ 26 (Earls, J., dissenting).

¶ 97 In *Wilkerson*, the defendant was incarcerated for over three years following his arrest on charges of first-degree murder, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. *Wilkerson*, 257 N.C. App. at 927, 930, 810 S.E.2d at 391, 392. In noting that the length of delay surpassed the one-year mark, the Court of Appeals concluded that this factor "trigger[ed] the need for analysis of the remaining three *Barker* factors." *Id.* at 930, 810 S.E.2d at 392. The Court of Appeals, however, then went on to state that this length of delay can also "create[ ] a prima facie showing that the delay was caused by the negligence of the prosecutor." *Id.* (quoting *State v. Strickland*, 153 N.C. App. 581, 586, 570 S.E.2d 898, 902 (2002)). Pulling this proposition from *Strickland*, which in turn regurgitates this rule from another case from that court,[7] the Court of Appeals announced that once this prima facie case, predicated on the passage of time alone, is made, "the burden shifts to the State to rebut and offer explanations for the delay." *Wilkerson*, 257 N.C. App. at 930, 810 S.E.2d at 392–93.

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7. Both *Wilkerson* and *Strickland* appear to take this line of thinking from yet another Court of Appeals case, *State v. Chaplin*, 122 N.C. App. 659, 471 S.E.2d 653 (1996). Notably, however, the *Chaplin* panel cited no cases to support this proposition.

¶ 98 The idea that the mere passage of time entitles a defendant to relief has been routinely rejected by this Court. Instead of heeding the instruction that an excessive pretrial incarceration period only triggers the need for analysis into the remaining *Barker* factors, this line of cases from the Court of Appeals (and most concerning, the majority here) reconfigures *Barker* such that a delay no longer merely advances the analysis to the second factor, but rather shifts the burden of proof to the State. However, this shift is illusory because, in the majority's view, the burden would always rest with the State. The majority does not explain why it shifts the burden prior to analysis of the second prong in this case, or why it is appropriate to deviate from clear precedent that the "defendant has the burden of showing that the delay was caused by the *neglect* or *willfulness* of the prosecution." *Farmer*, 376 N.C. at 415, 852 S.E.2d at 341 (quoting *Spivey*, 357 N.C. at 119, 579 S.E.2d at 255). Moreover, the majority does not provide any instruction as to whether the burden should return to defendant. This Court simply ignores well-established precedent to reach a desired outcome.

¶ 99 The majority further diverges from the requirements of *Barker* in its approach to the final prong of the analysis, prejudice to the defendant. The assessment of whether prejudice exists involves a look into "the interests of defendants" that the right to a speedy trial was designed to safeguard. *Barker*, 407 U.S. at 532, 92 S. Ct. at 2193, 33 L. Ed. 2d at 118. The Supreme Court of the United States "has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Id*. The final factor—an impairment of the defendant's defense—is the most serious, as it affects a defendant's ability to prepare his case for trial. *Id*.

¶ 100 Here, the majority cites *Doggett* for the proposition that it "may be impossible for the defendant to produce evidence of demonstrable prejudice" in the context of a *Barker* challenge. The majority then states that what is termed as "presumptive prejudice" may now be sufficient to tip the scales and "require dismissal of the charges" against a defendant. Notably, however, *Doggett* concerned a defendant who was neither in custody before his trial nor informed of the charges pending against him. 505 U.S. at 648–51, 112 S. Ct. at 2689–90, 120 L. Ed. 2d at 526–28. For this reason, it was difficult for the defendant to show prejudice simply because many of the speedy trial interests were not applicable. *Id*. at 654–56, 112 S. Ct. at 2692–93, 120 L. Ed. 2d at 529. This alone makes the majority's heavy reliance on *Doggett* misplaced. Nonetheless, in looking past obvious factual discrepancies, while *Doggett* purports to suggest that prejudice may sometimes be inferred, this inference can only be

made when prejudice is "neither extenuated, as by the defendant's acquiescence, nor persuasively rebutted." *Id.* at 658, 112 S. Ct. at 2694, 120 L. Ed. 2d at 532 (cleaned up). Here, the majority suggests that no justification was given by the State to rebut such "prejudice," while simultaneously barring the State from presenting such a justification through the testimony of Mr. Davis.

¶ 101 Further, defendant here makes no claim that any prejudice that occurred was "impossible" to demonstrate or "unidentifiable" to him; the majority does so on his behalf. Defendant's speedy trial motion specifically alleged that he had been "prejudiced by an inability to adequately assist his defense attorney" and by additional charges being brought by the State. While defendant failed to point to any defense he was unable to develop or witness he was unable to secure, Mr. Davis testified that the majority of the witnesses that defendant would call were family members who were readily available. In addition, Mr. Davis testified that defendant had been informed by the State at an early stage that additional charges were possible if he did not plead guilty to lesser charges. Although these additional charges carried the possibility for increased punishment, the underlying allegations against defendant arose from the same set of facts and his criminal record. As such, the reason the trial court found that defendant did not suffer prejudice was not because such was impossible to demonstrate but rather because none had occurred.

¶ 102 Even so, a mere "*possibility* of prejudice is not sufficient to support [a defendant's] position that their speedy trial rights were violated." *United States v. Loud Hawk*, 474 U.S. 302, 315, 106 S. Ct. 648, 656, 88 L. Ed. 2d 640, 654 (1986) (emphasis added). As this Court has expressly held, "a demonstration of *actual* prejudice experienced by defendant" is required to prove defendant suffered prejudice stemming from the delay of his trial. *Farmer*, 376 N.C. at 419, 852 S.E.2d at 343 (emphasis added).

¶ 103 Defendant has failed to carry his burden under *Barker*. Nonetheless, contrary to the overwhelming weight of authority from this Court and the Supreme Court of the United States, the majority effectively holds that the mere passage of time entitles defendant to relief on a motion to dismiss for a purported speedy trial violation. Moreover, the majority eliminates the requirement under *Barker* that defendant demonstrate actual prejudice resulting from the delay.

¶ 104 For the reasons stated herein, I would uphold the decision of the trial court and reverse the decision of the Court of Appeals.

Chief Justice NEWBY and Justice BARRINGER join in this dissenting opinion.

STATE v. ROBINSON

[381 N.C. 207, 2022-NCSC-60]

STATE OF NORTH CAROLINA
v.
LEWIE P. ROBINSON

No. 533A20

Filed 6 May 2022

1. Appeal and Error—standard of review—conclusion that factual basis exists to support guilty plea—de novo

A trial court's conclusion regarding the sufficiency of a factual basis to support a defendant's guilty plea requires an independent judicial determination and, as such, is subject to de novo review on appeal.

2. Assault—guilty plea—multiple charges—factual basis—no evidence of distinct interruption in assault

The factual basis for defendant's guilty plea to multiple assaults was insufficient to support the trial court's decision to accept the plea and sentence defendant to three separate and consecutive assault sentences based on an assaultive episode in which defendant grabbed the victim's neck, punched her multiple times, and strangled her. Although the victim stated that defendant had held her captive for three days, the evidence as presented to the trial court did not describe any distinct interruptions between the assaults—whether a lapse in time, a change in location, or other intervening event—but instead indicated a confined and continuous attack.

3. Criminal Law—guilty plea—multiple assault charges—insufficient factual basis—remedy—entire plea vacated

Where there was an insufficient factual basis to support defendant's plea of guilty to multiple assaults—because defendant committed one continuous assault—the appropriate remedy was to vacate the entire plea and remand to the trial court for further proceedings.

Chief Justice NEWBY dissenting.

Justice BARRINGER joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 275 N.C. App. 330 (2020), affirming in part a judgment entered 5 December 2018 by Judge Marvin P. Pope, Jr.,

in Superior Court, Buncombe County, and remanding for resentencing. Heard in the Supreme Court on 21 March 2022.

Joshua Stein, *Attorney General*, *by Jessica Macari*, *Assistant Attorney General for the State.*

Dylan J.C. Buffum, *for defendant.*

HUDSON, Justice.

¶ 1 In *State v. Dew*, this Court determined that "the State may charge a defendant with multiple counts of assault only when there is substantial evidence that a distinct interruption occurred between assaults." 379 N.C. 64, 2021-NCSC-124, ¶ 27. Here, we must apply that principle to the context of a guilty plea, in which the trial court sentenced defendant to separate and consecutive sentences based on several assault charges arising from one assaultive episode. Because the facts presented at the plea hearing did not establish that a distinct interruption occurred between assaults, we affirm the decision of the Court of Appeals that the trial court lacked a sufficient factual basis to accept defendant's guilty plea. Because we see no basis for rejecting defendant's guilty plea in part, however, we modify the holding of the Court of Appeals by vacating the entire plea arrangement and remanding to the trial court for further proceedings.

I. Factual and Procedural Background

A. Charges and Guilty Plea

¶ 2 In May 2018, defendant and Leslie Wilson were in a dating relationship in which Wilson became the victim of defendant's domestic violence. On or around the evening of 27 to 28 May 2018, Wilson and defendant were at Wilson's home together when defendant attacked her. Specifically, defendant grabbed Wilson around the neck, punched her several times in the face and chest, and strangled her while holding her down on a bed. When law enforcement arrived, Wilson stated that defendant had held her captive for three days. Wilson sustained severe injuries to her jaw, neck, and chest from the attack, requiring extensive medical treatment. On 4 December 2018, defendant was formally charged with four offenses: assault on a female, violation of a domestic violence protective order (DVPO), assault inflicting serious bodily injury, and assault by strangulation.

¶ 3 On 5 December 2018, defendant's case came on for hearing in Buncombe County Superior Court. Through his appointed counsel, defendant agreed to plead guilty to each of the four charged offenses. Under the terms of this original plea agreement, the State agreed to consolidate the four offenses into one Class F Felony judgment, with defendant receiving a single active prison sentence of 23–37 months. In establishing the factual basis for defendant's plea, the State described the facts surrounding the charges as follows:

> Your Honor, this occurred on May the 28th, 2018. Officers responded just after midnight that morning . . . to [Wilson's house]. The caller was Ms. Leslie Wilson who is present today, Your Honor. She stated that she'd been held captive by the defendant for three days and there was an active [DVPO] in place.
>
> When officers arrived, Ms. Wilson was present and stated that. . . defendant[ ] had grabbed her around the neck and that while he was choking her she had a taken a box cutter from him. During the assault that occurred over that night, Your Honor, Ms. Wilson was punched a number of times causing a broken jaw and a dislodged breast implant. She also had small cuts on her hands that were consistent with the altercation, as well as bruising around her neck. Ms. Wilson describes that during the strangulation she was unable to breathe and felt like she was going to pass out. She had tenderness about her neck for a few days after. Additionally, she was unable to eat food properly for about six weeks after the assault due to the condition of her jaw, Your Honor.

¶ 4 After defendant's counsel agreed with this factual presentation by the State, the trial court requested to hear directly from Wilson, who was present at the hearing. In response to the trial court asking her to describe the incident, Wilson stated as follows:

> We were both drinking and he was getting ill, so I dumped all the beer out. Dumped out everything I could find. And then I locked myself in the bathroom. And he broke two doors trying to get to me and he kept telling me to tell him where I had hid the beer. I didn't want to tell him then that I'd poured it out because I was so afraid. But I poured it out, trying

> to keep him from getting to this point. And then he got after me and I had a box cutter, which I was trying to defend myself at that point, and he held me down on the bed. I actually blacked out twice. And when he was strangling me and told me I needed to learn where the pressure points was, with his elbow on my jawbone and my throat. And then when I got back up I did—I had the box cutter but I was trying—I was scared to death. I thought he was going to kill me. I couldn't even hardly talk.

When the trial court subsequently asked Wilson whether she understood the terms of defendant's plea and why the court should accept the plea, Wilson responded affirmatively and stated she "just want[ed] to close this chapter of [her] life and move on."

¶ 5 Ultimately, addressing defendant's counsel, the trial court stated the following:

> So I'm telling you this, [defense counsel], I'm rejecting the plea the way it is now. I will sentence [defendant] to four consecutive sentences for active time, if you want to renegotiate your plea arrangement. Otherwise, I'll sign off on it, won't take it, and you can take it in front of another judge and see if you can sell this bill of goods to some other person. I'm not going to take it.

The court then took a brief recess to allow the parties to reconvene.

¶ 6 Twenty-four minutes later, the parties returned with a new plea arrangement. Under the new plea arrangement, defendant pleaded guilty to the same four charges as in the original plea arrangement: one count of assault on a female, one count of DVPO violation, one count of assault inflicting serious bodily injury, and one count of assault by strangulation. However, where the original plea agreement consolidated the four offenses into one sentence, the new plea arrangement offered four separate sentences: one Class F felony judgment with an active sentence of 23–37 months; one Class H felony judgment with a consecutive active sentence of 15–27 months; and two consecutive A1 misdemeanor judgments of two 150-day suspended sentences with supervised probation. Notably, the trial court did not solicit further factual statements to support the new plea arrangement; instead, it relied solely on the previous statements from the prosecutor and Wilson. After defendant duly agreed to the plea arrangement, the trial court accepted it and entered judgment accordingly.

B. Court of Appeals

¶ 7 On 5 August 2019, defendant filed a petition for writ of certiorari with the North Carolina Court of Appeals pursuant to N.C.G.S. § 15A-1444. Although defendant's petition requested appellate review of four issues, the Court of Appeals, in its discretion, allowed defendant's petition on only one of these issues: whether the trial court had a sufficient factual basis to accept the new plea arrangement and enter separate and consecutive judgments accordingly. Specifically, defendant argued that the trial court erred when it accepted the new plea arrangement and entered judgment on three assault charges because the factual summary provided by the State and Wilson did not establish more than one assault.

¶ 8 On 15 December 2020, the Court of Appeals filed a divided opinion in which the majority concluded that "there was an insufficient factual basis for [d]efendant's guilty plea." *Robinson*, 275 N.C. App. at 331.

¶ 9 First, the majority noted that by statute, a "judge may not accept a plea of guilty . . . without first determining that there is a factual basis for the plea." N.C.G.S. § 15A-1022(c) (2021). The court observed that such a factual basis may be provided by a statement of facts by the prosecutor, and that a "trial court may also 'consider any information properly brought to its attention in determining whether there is a factual basis for a plea of guilty.' " *Id.* at 334 (quoting *State v. Dickens*, 299 N.C. 76, 79 (1980) (cleaned up)). Further, relying on its own precedent in *State v. Williams*,[1] the majority noted that "in order for a defendant to be charged with multiple counts of assault, there must be multiple assaults. This requires evidence of a distinct interruption in the original assault followed by a second assault." *Robinson*, 275 N.C. App. at 335 (quoting *State v. Williams*, 201 N.C. App. 161, 182 (2009)).

¶ 10 Here, the Court of Appeals majority noted, "the State's summary of the factual basis for the plea was brief" and "indicated that this was a singular assault, without distinct interruption, during which Wilson was strangled, beaten, and cut." *Robinson*, 275 N.C. App. at 334–35. The majority observed that "nothing in the State's factual summary suggests that there was a distinct interruption that would support multiple assault convictions." *Id.* at 335. Instead, "the prosecutor's language shows that she only referenced a singular assault during her summary of the factual basis for the plea arrangement," using singular language such as "the assault" or "the altercation." *Id.* "Moreover," the majority noted,

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1. The Court of Appeals opinion was published before this Court's ruling in *State v. Dew*, 379 N.C. 64, 2021-NCSC-124. In *Dew*, the Court clarified the requirements for being charged with multiple counts of assault.

"Wilson's statement to the trial court at the hearing provided no evidence of a distinct interruption in the assault." *Id.* Finally, the majority stated that "[t]he fact that [d]efendant held Wilson captive for three days does not, alone, compel the conclusion that he committed multiple assaults against Wilson during that period." *Id.* at 336. Given this lack of substantial evidence of a distinct interruption in the assault, the Court of Appeals majority concluded "that [d]efendant has shown that the State did not provide a sufficient factual basis for the trial court to accept his guilty plea and enter judgments on multiple assault charges." *Id.*

¶ 11 Second, because the offense of assault inflicting serious bodily injury (Class F felony) is classified as more severe than the offenses of assault by strangulation (Class H felony) and assault on a female (Class A1 misdemeanor), the Court of Appeals majority concluded that "[d]efendant could only be punished for the offense of assault inflicting serious bodily injury, and not for the other two assault offenses as well." *Id.* at 338. Specifically, the majority reasoned that "[b]ecause the factual basis for [d]efendant's guilty plea . . . supported just one assault conviction, the trial court was only authorized to enter judgment and sentence [d]efendant for one assault—that which provided for the greatest punishment of the three assault offenses to which [d]efendant pleaded guilty." *Id.*

¶ 12 Finally, relying on this Court's ruling in *State v. Fields*, the Court of Appeals majority concluded that "the appropriate course of action is to arrest judgment on [d]efendant's convictions for assault on a female. . . and assault by strangulation[,]" while affirming defendant's conviction for assault inflicting serious bodily injury. *Robinson*, 275 N.C. App. at 338 (citing *State v. Fields*, 374 N.C. 629, 636–37 (2020)). The majority subsequently remanded the case to the trial court with instructions to arrest these two lesser judgments and to resentence defendant on the remaining charges. *Id.*

¶ 13 Judge Berger dissented. *See id.* at 339 (Berger, J., dissenting). The dissent would have denied defendant's petition for writ of certiorari because, in its view, defendant failed to make the required showing of merit or that error was probably committed below. Specifically, the dissent relied upon this Court's ruling in *State v. Rambert*, 341 N.C. 173 (1995), to conclude that "[d]efendant's separate and distinct actions [during the assaultive episode] are not the same conduct," and therefore that the trial court did not err in sentencing defendant for separate assaults. *Id.* at 339–40 (Berger, J., dissenting).

¶ 14 In *Rambert*, the defendant was charged and convicted of three separate counts of discharging a firearm into occupied property after firing

three shots from a handgun into an occupied car. 341 N.C. at 174–176. In rejecting defendant's claim that this evidence supported only a single conviction, not three, this Court "noted that (1) the defendant employed his thought process each time he fired the weapon, (2) each act was distinct in time, and (3) each bullet hit the vehicle in a different place." *Dew*, 379 N.C. 64, 2021-NCSC-124, ¶ 25 (citing *Rambert*, 341 N.C. at 177).

¶ 15 Applying these *Rambert* factors to the case at bar, the dissent here reasoned that defendant's actions of (1) grabbing Wilson by the neck, (2) punching Wilson in the face and chest, and (3) placing his forearm on Wilson's neck constituted "at least three separate and distinct acts" for which the trial court could properly sentence defendant separately. *Robinson*, 275 N.C. App. at 342–43 (Berger, J., dissenting). Specifically, the dissent noted that defendant's actions during the assaultive episode each required a different thought process, were distinct in time, and resulted in injuries to different body parts. *Id.* at 343 (Berger, J., dissenting). Accordingly, the dissent would have held that the factual showing made at the hearing reasonably supported the trial court's decision to sentence defendant based on three separate assault offenses. *Id.* (Berger, J., dissenting).

C. Present Appeal

¶ 16 On 19 January 2021, the State filed a notice of appeal with this Court based on the Court of Appeals dissent. In its appeal, the State argues that the trial court properly determined that there was a factual basis for defendant's guilty plea, and therefore that the Court of Appeals majority erred in reversing the trial court's judgment and sentences.

¶ 17 First, the State argues that this Court has not yet identified the applicable standard of review, but that it has made clear that the question before the trial court is limited and the scope of review is narrow. The State contends that the Court of Appeals majority erred in reviewing the factual basis for defendant's guilty plea de novo based on a "statutory interpretation" standard of review. Even if the correct standard of review is de novo, the State contends, "review is limited to a narrower question than what the Court of Appeals majority addressed . . . [because] [t]he test applied by the trial court is merely whether there is some substantive material independent of the plea itself which tends to show guilt. Because the trial court's determination below was "distinctly fact-bound[,]" the State contends, appellate courts must consider it "with respect for [the] trial court['s] discretion."

¶ 18 Second, the State argues that the facts presented to the trial court during defendant's hearing adequately support defendant's guilty

plea to three distinct assaults. The State notes that under N.C.G.S. § 15A-1022(c), a trial court "may not accept a plea of guilty . . . without first determining that there is a factual basis for the plea." The State notes that this determination requires that "some substantive material independent of the guilty plea itself appear of record which tends to show that defendant is, in fact, guilty." *State v. Sinclair*, 301 N.C. 193, 199 (1980).

¶ 19 Here, the State argues, the facts presented at the hearing by the prosecutor and Wilson adequately support the trial court's sentencing under each distinct charge of assault. As reasoned by the Court of Appeals dissent, the State contends that defendant's actions constitute three distinct assaults: (1) grabbing Wilson's neck (assault on a female); (2) punching Wilson in the face and chest (assault inflicting serious bodily injury); and (3) pushing his forearm against Wilson's neck (assault by strangulation). The State argues that these facts "easily clear [*Sinclair*'s] threshold of 'some substantive material independent of the plea itself . . . which tends to show' that the defendant committed the crimes charged against him." As such, the State argues that the Court of Appeals majority erred in ruling otherwise.

¶ 20 Third, the State argues that the Court of Appeals majority followed the wrong analytical framework when it determined that only one assault had occurred. Specifically, the State asserts that the majority gave improper weight to the "distinct interruption" standard instead of following this Court's precedent from *State v. Rambert*, 341 N.C. 173, (1995).[2] Under *Rambert*, the State contends that the relevant factors in determining whether a defendant committed one or multiple criminal acts include: (1) whether each action required defendant to employ a separate thought process; (2) whether each act was distinct in time; and (3) whether each act resulted in a different outcome. Under this analysis, the State argues, no "distinct interruption" is required between assaults because defendant attacked Wilson in "at least three different ways," rendering the three assault charges and sentences proper.

¶ 21 Finally, at oral arguments, which took place *after* this Court's ruling in *Dew*, the State argued that even under *Dew*'s distinct interruption requirement, sufficient facts were summarized during the hearing to support the defendant's separate sentences. For instance, counsel for the State proffered that Wilson pouring the beer down the sink, locking

2. The briefs from both the State and defendant here were filed before the publication of this Court's ruling in *State v. Dew*, 379 N.C. 64, 2021-NCSC-124. *Dew* was published between the filing of the briefs and oral arguments.

herself in the bathroom, blacking out twice, or defendant "getting ill" could each reasonably constitute a distinct interruption in the assaultive episode. Further, the State emphasized that Wilson told law enforcement that defendant had held her captive in the home for three days, and that over this extended period of time "there had to have been ebbs and flows in the momentum of the attack—there had to be lapses of time to calm down, to eat, to go to the bathroom." As such, the State argued, the trial court had a sufficient factual foundation for defendant's three separate judgments and sentences.

¶ 22 In response, defendant argues that the Court of Appeals majority did not err. Regarding the proper standard of review, defendant asserts that the trial court's ruling on the sufficiency of a factual basis is subject to de novo appellate review because "whether the record shows that there was a sufficient factual basis for the plea is a quintessential question of law[.]" Because the only question following a guilty plea is whether the uncontested facts support each of the elements of each of the charged offenses, defendant argues that "[t]his is no different than appellate review of a motion to dismiss after the close of evidence[,]" which is conducted de novo.

¶ 23 Next, defendant argues that the Court of Appeals ruling was correct on the merits because the facts presented to the trial court did not support entry of judgment on three distinct assaults. Rather, defendant argues that the factual basis provided by the State would have supported any one of the assault charges, but not all three. Defendant particularly notes that the prosecutor's description of the assault repeatedly referred to "the assault" as a singular event, not multiple or distinct attacks, and that Wilson's description of the attack corroborated this singularity. As such, defendant contends, "nothing in the State's recitation would support an inference that three separate assaults occurred[.]"

¶ 24 In alignment with the majority opinion below, defendant argues that to support multiple assault convictions stemming from a single transaction, evidence must establish a distinct interruption in the transaction followed by a separate and distinct assault. "While the *Rambert* Court determined each distinct act of discharging a gun constituted a separate unit of prosecution and supported a separate conviction[,]" defendant asserts, "nothing in *Rambert* suggested assault is defined the same way."

¶ 25 Finally, at oral arguments, defense counsel argued that *Dew*'s distinct interruption requirement is controlling and dispositive in this case because the factual summary provided by the State and Wilson at the hearing described the assault as one continuous episode, without any

distinct interruptions. Although Wilson reported that defendant had held her captive for three days, defense counsel noted that the hearing statements and the record only described one distinct assaultive episode, not an ongoing attack over the course of three days. Accordingly, defendant contends, the Court of Appeals majority correctly determined that the trial court lacked a sufficient factual basis to sentence defendant on three separate assault convictions.

II. Analysis

¶ 26 Now, we must determine whether the trial court had a sufficient factual basis to sentence defendant to three separate and consecutive assault sentences. Under the distinct interruption requirement established by *Dew*, 379 N.C. 64, 2021-NCSC-124, we hold that it did not, and therefore partially affirm the ruling of the Court of Appeals majority. 2021-NCSC-124. However, because defendant's guilty plea must be accepted or rejected as a whole, rather than piecemeal, we modify the holding of the Court of Appeals by vacating the entire plea arrangement and remanding to the trial court for further proceedings.

A. Standard of Review

¶ 27 **[1]** First, we must address the appropriate standard of review. Below, the Court of Appeals majority determined that "[d]efendant raises an issue of statutory construction[,]" and thus applied de novo review. *Robinson*, 275 N.C. App. at 333. On appeal, the State contends that in light of the trial court's limited test in these circumstances, appellate review should be narrow and deferential. Defendant, contrastingly, asserts that "[w]hether the record shows that there was a sufficient factual basis for the plea is a quintessential question of law, which is properly subject to de novo review."

¶ 28 As an initial matter, we disagree with the reasoning of the Court of Appeals majority that "[d]efendant raises an issue of statutory construction." The core dispute between the parties here does not revolve around competing interpretations of a statute, but around competing applications of certain legal requirements to these facts.

¶ 29 Nevertheless, we agree with the ultimate determination of the Court of Appeals majority and with defendant that this appeal is properly reviewed de novo. Under N.C.G.S. § 15A-1022(c), a "judge may not accept a plea of guilty . . . without first determining that there is a factual basis for the plea." In *State v. Agnew*, this Court observed that this statutory condition "requires an *independent judicial determination* that a sufficient factual basis exists before a trial court accepts a guilty plea."

361 N.C. 333, 333–34 (2007) (emphasis added).[3] At its core, such an "independent judicial determination" requires the trial court to exercise judgment and apply legal principles by considering whether the stipulated facts fulfill the various elements of the offense or offenses to which the defendant is pleading guilty. Although a defendant who pleads guilty can and does stipulate to the *factual* summary presented by the State, this stipulation cannot and does not relieve the trial court of its subsequent duty to conduct an "independent judicial determination that a sufficient factual basis exists" to support the *legal* requirements of the charged offenses. *Id*. Accordingly, we hold that a trial court's determination as to whether a sufficient factual basis exists to support a defendant's guilty plea is a conclusion of law reviewable de novo on appeal. *Cf. Plott v. Plott*, 313 N.C. 63, 73 (1985) (noting that a trial court's determination is "properly denominated a conclusion of law [when] it states the legal basis upon which [a] defendant's liability may be predicated under the applicable statute(s)"); *Woodard v. Mordecai*, 234 N.C. 463, 472 (1951) (observing that conclusions of law are "reached by . . . an application of fixed rules of law").

B. "Distinct Interruption" Analysis

¶ 30 **[2]** Second, we must consider whether the trial court erred in determining that it had a sufficient factual basis to sentence defendant to three separate and consecutive assault sentences. As noted by both parties during oral arguments, this determination is governed by this Court's recent ruling in *State v. Dew*, 379 N.C. 64, 2021-NCSC-124.

¶ 31 Before *Dew*, different Court of Appeals decisions applied somewhat differing methods of analysis to determine whether the facts of one assaultive episode supported multiple assault charges. While these cases were unified in requiring "a distinct interruption in the original assault followed by a second assault" in order to support multiple assault charges, *State v. Brooks*, 138 N.C. App. 185, 189 (2000), they were divided as to what factors illustrated such a "distinct interruption." In some cases, the Court of Appeals generally looked for evidence of a clear and significant break or demarcation within the assaultive episode. *See*, *e.g.*, *Robinson*, 275 N.C. App. at 335–36 (finding "no evidence of a distinct interruption in the assault"); *State v. McPhaul*, 256 N.C. App. 303, 317–18 (2017) (same). In others, the Court of Appeals more specifically

3. Although this Court in *Agnew* did not formally state that it was reviewing the trial court's determination de novo, it functionally engaged in de novo review by considering anew the factual information before the trial court when the defendant's guilty plea was accepted. *See Agnew*, 361 N.C. at 337 (considering the facts and record presented to the trial court before its guilty plea determination).

applied this Court's analysis in *State v. Rambert* to consider whether the defendant's actions employed different thought processes, were distinct in time, and caused different injuries. *See*, *e.g.*, *State v. Dew*, 270 N.C. App. 458, 462–63 (applying the three *Rambert* factors to determine whether there was a distinct interruption between assaults); *State v. Littlejohn*, 158 N.C. App. 628, 636 (2003) (same). The use of these differing analytical frameworks created tension between various Court of Appeals opinions considering the issue. *See*, *e.g.*, *Robinson*, 275 N.C. App. at 340 (Berger, J., dissenting) (opining that the majority opinion "ignores binding precedent and fails to conduct an analysis under *State v. Rambert*"); *compare State v. Dew*, 270 N.C. App. 458, 462–63 (applying *Rambert* factors) *with Robinson*, 275 N.C. App. at 335–36 (not applying *Rambert* factors).

¶ 32 In *Dew*, this Court resolved this tension in favor of the more general "distinct interruption" approach. 379 N.C. 64, 2021-NCSC-124. Because "[m]ultiple contacts can still be considered a single assault[ ] even though each punch or kick would require a different thought process, would not occur simultaneously, and would land in different places on the victim's body[,]" this Court "conclude[d] that the *Rambert* factors are not the ideal analogy for an assault analysis." Accordingly, we "decline[d] to extend *Rambert* to assault cases generally." *Id.* at ¶ 26. Instead, this Court provided examples—though not an exclusive list—of what can qualify as a distinct interruption: "an intervening event, a lapse of time in which a reasonable person may calm down, an interruption in the momentum of the attack, a change in location, or some other clear break delineating the end of one assault and the beginning of another." *Id.* at ¶ 27. Likewise, the Court clarified "what does *not* constitute a distinct interruption." For instance,

> the fact that a victim has multiple, distinct injuries alone is not sufficient evidence of a distinct interruption such that a defendant can be charged with multiple counts of assault. The magnitude of the harm done to the victim can be taken into account during sentencing but does not automatically permit the State to stack charges against a defendant without evidence of a distinct interruption.

Id. at ¶ 28. Further, a defendant's "different methods of attack standing alone are insufficient evidence of a distinct interruption." *Id.* at ¶ 35.

¶ 33 Here, the parties agreed at oral argument that *Dew*'s "distinct interruption" analysis governed this case but argued for different results.

The State argued that any number of events noted in the factual summaries provided by the prosecutor and Wilson at the hearing could indicate a distinct interruption in the attack, including Wilson pouring out the beer, Wilson locking herself in the bathroom, Wilson blacking out, or defendant "getting ill." Further, the State emphasized that Wilson reported that defendant held her captive in the home for three days, and that over this extended period of time "there had to have been ebbs and flows in the momentum of the attack" constituting a distinct interruption. Contrastingly, defense counsel asserted that the factual summary provided by the State and Wilson at the hearing clearly and repeatedly described the assault as one continuous episode, without any evidence of distinct interruptions.

¶ 34 We agree with the Court of Appeals majority and defendant that the facts provided at the hearing fail to establish evidence of a distinct interruption in the assault to support multiple assault convictions and sentences. Neither the prosecutor's factual summary nor Wilson's statement note "an intervening event, a lapse of time in which a reasonable person may calm down, an interruption in the momentum of the attack, a change in location, or some other clear break delineating the end of one assault and the beginning of another." *Id.* at ¶ 27. Instead, the factual statements as given describe a confined and continuous attack in which defendant choked and punched Wilson in rapid succession and without pause or interruption.

¶ 35 We acknowledge that one can *imagine* a distinct interruption being described here with additional facts. For instance, if the facts indicated that the attack began in the bathroom but then moved to the bedroom, such a change in location may constitute a distinct interruption. Likewise, if there was evidence presented of multiple different attacks occurring over the course of Wilson's three-day captivity, such a lapse of time and interruption in momentum could clearly constitute a distinct interruption. However, like the trial court, this Court must consider the factual summary not as it *could have been*, but as it was presented. As it was presented, the factual summary provided by the State and Wilson at the hearing describe no such discernible sequence of events indicating a distinct interruption in the assault.

¶ 36 Without evidence of a distinct interruption in the assault, the trial court did not have a sufficient factual basis upon which to sentence defendant to separate and consecutive assault sentences. Accordingly, we affirm the ruling of the Court of Appeals majority that the trial court erred when it accepted the plea and entered judgment on the three different assault charges. *Robinson*, 275 N.C. App. at 333–34.

C. Remedy

¶ 37 **[3]** Finally, we must consider an appropriate remedy. Below, the Court of Appeals majority relied on this Court's ruling in *State v. Fields* to determine that "the appropriate course of action is to arrest judgment on [d]efendant's convictions for assault on a female . . . and assault by strangulation[,]" and thus remanded the case to the trial court to resentence defendant only on the remaining two charges (assault inflicting serious bodily injury and violation of a DVPO). *Robinson*, 275 N.C. App. at 338 (citing *Fields*, 374 N.C. at 636–37).

¶ 38 We cannot agree. Although this Court in *Fields* held that "the Court of Appeals should have arrested the trial court's judgment for [a lesser included offense] rather than vacating the judgment[,]" 374 N.C. at 637, a key procedural difference between the cases renders that remedy improper here: whereas the defendant in *Fields* was convicted via jury trial, defendant here was convicted via guilty plea. *Id.* at 631. Because a guilty plea, like a contract, is the result of nuanced negotiations between a defendant and the State, it is not the role of an appellate court to accept certain portions of the plea deal while rejecting others. *See State v. Collins*, 300 N.C. 142, 149 (1980) (viewing a guilty plea "in light of the analogous law of contracts" in which "the consideration given for the prosecutor's promise . . . is defendant's actual performance by [pleading guilty]"). Rather, defendant's plea arrangement constitutes a finished product which must be accepted or rejected in its entirety, not piecemeal. *See* N.C.G.S. § 15A-1023 (describing a judge's authority to either accept or reject a plea arrangement). Accordingly, we modify the ruling of the Court of Appeals on this issue by arresting each of the trial court's judgments and remanding to the trial court for any further proceedings.

III. Conclusion

¶ 39 According to our decision in *Dew*, "the State may charge a defendant with multiple counts of assault only when there is substantial evidence that a distinct interruption occurred between assaults." 379 N.C. 64, 2021-NCSC-124, ¶ 27. Because the facts presented at defendant's plea hearing did not establish that a distinct interruption occurred between assaults, we affirm the ruling of the Court of Appeals that the trial court lacked a sufficient factual basis to accept defendant's guilty plea. However, because defendant's guilty plea must be accepted or rejected as a whole, we modify the holding of the Court of Appeals by vacating the entire plea arrangement and remanding to that court for further remand to the trial court for further proceedings.

MODIFIED AND AFFIRMED.

Justice BERGER did not participate in the consideration or decision of this case.

Chief Justice NEWBY dissenting.

¶ 40 This case requires us to determine whether the trial court properly determined that there was a factual basis for defendant's guilty plea. A guilty plea must be substantiated in fact by some substantive material independent of the plea itself which tends to show that the defendant is guilty. Moreover, for sentences to be entered against a defendant for multiple assaults arising from closely connected conduct, the evidence must show a distinct interruption occurred between the assaults. Here the prosecutor's factual summary and the testimony of the victim tended to show that there was a distinct interruption between each assault. Accordingly, there was a factual basis for defendant's plea to each assault and the trial court properly entered each judgment and sentence against defendant. I respectfully dissent.

¶ 41 A defendant's appeal following a guilty plea is limited by statute. *State v. Ledbetter*, 371 N.C. 192, 195, 814 S.E.2d 39, 42 (2018). N.C.G.S. § 15A-1444(e) provides that a "defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty . . . to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari." N.C.G.S. § 15A-1444(e) (2021). "Certiorari is a discretionary writ, to be issued only for good and sufficient cause shown." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (emphasis omitted). The Court of Appeals may issue a writ of certiorari when the petition "show[s] 'merit or that error was probably committed below.' " *State v. Ricks*, 378 N.C. 737, 2021-NCSC-116, ¶ 6 (quoting *Grundler*, 251 N.C. at 189, 111 S.E.2d at 9). This Court "review[s] the Court of Appeals' decision to allow a petition for writ of certiorari . . . for an abuse of discretion." *Ricks*, ¶ 5.

¶ 42 "[A] plea arrangement or bargain is '[a] negotiated agreement between a prosecutor and a criminal defendant whereby the defendant pleads guilty to a lesser offense or to one of multiple charges in exchange for some concession by the prosecutor . . . .' " *State v. Alexander*, 359 N.C. 824, 830, 616 S.E.2d 914, 919 (2005) (second alteration in original) (quoting *Plea Bargain*, *Black's Law Dictionary* (7th ed. 1999)). Because "[a] plea of guilty . . . involves the waiver of various fundamental rights," *State v. Sinclair*, 301 N.C. 193, 197, 270 S.E.2d 418, 421

(1980), the General Assembly has enacted legislation to protect criminal defendants, *see State v. Agnew*, 361 N.C. 333, 335, 643 S.E.2d 581, 583 (2007) ("[O]ur legislature has enacted laws to ensure guilty pleas are informed and voluntary.").

¶ 43 One such protection is that "guilty pleas must be substantiated in fact as prescribed by [N.C.G.S. § 15A-1022(c)]." *Id.* N.C.G.S. § 15A-1022(c) provides that

> [t]he judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea. This determination may be based upon information including but not limited to:
>
> (1) A statement of the facts by the prosecutor.
>
> (2) A written statement of the defendant.
>
> (3) An examination of the presentence report.
>
> (4) Sworn testimony, which may include reliable hearsay.
>
> (5) A statement of facts by the defense counsel.

N.C.G.S. § 15A-1022(c) (2021). Moreover,

> [t]he five sources listed in the statute are not exclusive, and therefore '[t]he trial judge may consider any information properly brought to his attention.' *State v. Dickens*, 299 N.C. 76, 79, 261 S.E.2d 183, 185–86 (1980). Nonetheless, such information 'must appear in the record, so that an appellate court can determine whether the plea has been properly accepted.' *Sinclair*, 301 N.C. at 198, 270 S.E.2d at 421. Further, in enumerating these five sources, the statute 'contemplate[s] that some substantive material independent of the plea itself appear of record which tends to show that defendant is, in fact, guilty.' *Id.* at 199, 270 S.E.2d at 421–22.

Agnew, 361 N.C. at 336, 643 S.E.2d at 583 (second and third alterations in original).

¶ 44 Here defendant was charged with, *inter alia*, misdemeanor assault on a female, *see* N.C.G.S. § 14-33(c)(2) (2021); felony assault inflicting serious bodily injury, *see* N.C.G.S. § 14-32.4(a) (2021); and felony assault by strangulation, *see* N.C.G.S. § 14-32.4(b) (2021). Our case law defines

"assault" as "an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force . . . must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm." *State v. Dew*, 379 N.C. 64, 2021-NCSC-124, ¶ 23 (quoting *State v. Roberts*, 270 N.C. 655, 658, 155 S.E.2d 303, 305 (1967)). Moreover, for defendant to be sentenced for multiple assaults, it must appear that "a distinct interruption occurred between assaults." *Id.* ¶ 27.

¶ 45 Here there was significant substantive material independent from the plea itself that tended to show a distinct interruption occurred between the assaults. First, the prosecutor offered a factual summary at the plea hearing:

> Your Honor, this occurred on May the 28th, 2018. Officers responded just after midnight that morning, Your Honor, to 37 Amirite Drive, A-m-i-r-i-t-e, Drive in Candler, North Carolina. The caller was Ms. Leslie Wilson who is present today, Your Honor. She stated that she'd been held captive by the defendant for three days and there was an active [domestic violence protective order] in place.
>
> When officers arrived, Ms. Wilson was present and stated that Lewie Robinson, the defendant, had grabbed her around the neck and that while he was choking her she had taken a box cutter from him. During the assault that occurred over that night, Your Honor, Ms. Wilson was punched a number of times causing a broken jaw and a dislodged breast implant. She also had small cuts on her hands that were consistent with the altercation, as well as bruising around her neck. Ms. Wilson describes that during the strangulation she was unable to breathe and felt like she was going to pass out. She had tenderness about her neck for a few days after. Additionally, she was unable to eat food properly for about six weeks after the assault due to the condition of her jaw, Your Honor. Thankfully, thanks to health insurance, she was not out-of-pocket any money for restitution which is why we're not seeking restitution in this case.

Then, when the trial court asked defendant's attorney if she "agree[d] with the factual presentation," defendant's attorney responded, "Yes."

¶ 46 At the trial court's request, Ms. Wilson testified regarding the events underlying the assault charges:

> We were both drinking and he was getting ill, so I dumped all the beer out. Dumped out everything I could find. And then I locked myself in the bathroom. And he broke two doors trying to get to me and he kept telling me to tell him where I had hid the beer. I didn't want to tell him then that I'd poured it out because I was so afraid. But I poured it out, trying to keep him from getting to this point. And when he got after me and I had a box cutter, which I was trying to defend myself at that point, and he held me down on the bed. I actually blacked out twice. And then he was strangling me and told me I needed to learn where the pressure points was, with his elbow on my jawbone and my throat. And then when I got back up I did—I had the box cutter but I was trying—I was scared to death. I thought he was going to kill me. I couldn't even hardly talk.

¶ 47 This evidence tends to show that distinct interruptions occurred between the assaults. One assault began when defendant "broke two doors trying to get to" the bathroom, where Ms. Wilson had locked herself in, and then "grabbed [Ms. Wilson] around the neck and . . . was choking her" before she took a box cutter from him. At some point, defendant "got after [Ms. Wilson]" and chased her from the bathroom to the bedroom. This change in location constituted a distinct interruption. After this interruption, defendant "held [Ms. Wilson] down on the bed." Defendant "strang[led] [Ms. Wilson] and told [her that she] needed to learn where the pressure points w[ere], with his elbow on [Ms. Wilson's] jawbone and [her] throat." Defendant thus caused Ms. Wilson to black out, creating another distinct interruption. When she awoke, Ms. Wilson still "had the box cutter" and tried to defend herself, but defendant nonetheless committed another assault by "punch[ing] [Ms. Wilson] a number of times causing a broken jaw and a dislodged breast implant." Thus, the substantive material independent of the plea tends to show that a distinct interruption occurred between the assaults. Accordingly, the trial court did not lack authority to sentence defendant for each assault.

¶ 48 In holding otherwise, the majority errs by wrongly applying a de novo standard of review to the trial court's determination that a factual basis existed for defendant's plea. In so doing, the majority expands the role of the trial court beyond that envisioned by the statute, into one

similar to the role performed when reviewing a motion to dismiss. After a defendant moves to dismiss the charges during a trial, the trial court must determine "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)). Similarly, the majority states that in determining whether a factual basis exists for a guilty plea, the trial court must "consider[ ] whether the stipulated facts *fulfill* the various elements of the offense or offenses to which the defendant is pleading guilty." When, however, "a defendant pleads guilty, no trial occurs," *State v. Alexander*, 2022-NCSC-26, ¶ 66 (Newby, C.J., concurring in the result), and there is no motion to dismiss; therefore, the substantial evidence standard does not apply.

¶ 49 Moreover, "[i]n a jury trial the judge instructs jurors on the law, and the jury finds the facts and applies the law." *State v. Arrington*, 371 N.C. 518, 521, 819 S.E.2d 329, 331 (2018). When a defendant pleads guilty, however, he admits his conduct constitutes the offense and waives the right to have a jury make that determination. *See Sinclair*, 301 N.C. at 197, 270 S.E.2d at 421 ("A plea of guilty . . . involves the waiver of . . . the right to trial by jury."). Specifically, in a "transcript of plea," which the trial court may properly consider under N.C.G.S. § 15A-1022(c)(2), the defendant and his attorney represent to the trial court that a factual basis exists for the guilty plea. *See Dickens*, 299 N.C. at 79, 261 S.E.2d at 186 (" '[A] written statement of the defendant' ordinarily consists of defendant's written answers to the questions contained in a document entitled 'Transcript of Plea.' " (quoting N.C.G.S. § 15A-1022(c)). Accordingly, given the defendant's representations and the nature of a plea hearing, the parties do not fully develop the factual record before the trial court. Thus, when accepting a guilty plea, the trial court's role is properly limited to determining whether the plea is "substantiated in fact," *Agnew*, 361 N.C. at 335, 643 S.E.2d at 583, by "some substantive material independent of the plea itself . . . which tends to show that defendant is, in fact, guilty," *id.* at 336, 643 S.E.2d at 583. Therefore, "[i]f the evidence considered in the light most favorable to the State" supports the guilty plea, then the trial court may accept the plea. *Sinclair*, 301 N.C. at 197, 270 S.E.2d at 421.

¶ 50 Using a de novo review of this limited factual record, however, the majority then holds that "the facts provided at the hearing fail to establish evidence of a distinct interruption in the assault." One need not "imagine," as the majority does, that a distinct interruption "such [as]

a change in location" occurred in this case. Rather, the evidence demonstrates exactly the hypothetical situation posited by the majority—one assault occurred in the bathroom, and then defendant chased Ms. Wilson into the bedroom and assaulted her again. Moreover, after defendant strangled Ms. Wilson, causing her to black out, the "lapse of time and interruption in momentum" imagined by the majority occurred until Ms. Wilson awoke. Defendant then assaulted Ms. Wilson a third time. Thus, the evidence tends to show two distinct interruptions occurred.[1]

¶ 51 The trial court did not err by determining that a sufficient factual basis existed for defendant's guilty plea. The Court of Appeals therefore abused its discretion by allowing defendant's petition for writ of certiorari. The decision of the Court of Appeals should be reversed and the trial court's entry of judgment and sentences against defendant should be affirmed. I respectfully dissent.

Justice BARRINGER joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
ROBERT WAYNE DELAU

No. 30A21

Filed 6 May 2022

1. Appeal and Error—preservation of issues—timely objection—grounds for objection—clear from context

In his trial for driving while impaired, defendant properly preserved the issue of whether a police officer gave improper lay opinion testimony—his opinion that defendant was the driver of a crashed moped—by timely objecting to the testimony. Defense counsel was not required to clarify the grounds for the objection because it was reasonably clear from the context.

2. Evidence—lay opinion—assumed error—prejudice analysis

Even assuming that admission of an officer's allegedly improper lay opinion testimony—his belief that a crashed moped was driven by defendant—was error, defendant could not prove prejudice

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1. Further, it should be noted that at the time the trial court accepted the plea, it did not have the benefit of this Court's decision in *State v. Dew*, 379 N.C. 64, 2021-NCSC-124, ¶ 27.

where other evidence admitted at his trial for driving while impaired included substantially similar information. Specifically, the warrant application (to draw defendant's blood) and defense counsel's cross-examination of the officer put essentially the same information before the jury.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, No. COA19-1030, 2020 WL 7974281 (N.C. Ct. App. Dec. 31, 2020), vacating a judgment entered on 28 November 2018 by Judge Marvin P. Pope, Jr., in Superior Court, Buncombe County, and remanding for a new trial. Heard in the Supreme Court on 15 February 2022.

Joshua H. Stein, Attorney General, by Zachary K. Dunn, Assistant Attorney General, for the State-appellant.

Joseph P. Lattimore for defendant-appellee.

HUDSON, Justice.

¶ 1 Here we consider whether defendant was prejudiced by the trial court's admission of certain testimony by a police officer that we assume without deciding violated Rule 701 of the North Carolina Rules of Evidence. Because we conclude that even assuming error, defendant was not prejudiced, we reverse the decision of the Court of Appeals.

I. Factual and Procedural Background

A. Accident and Trial

¶ 2 In the early morning hours of 15 June 2017, defendant Robert Wayne Delau was involved in a moped accident in Asheville, North Carolina. Paramedics were called to the scene and found defendant lying in the road, severely injured. Two officers from the Asheville Police Department, Henry Carssow (Officer Carssow) and Tyler Barnes (Office Barnes), also responded to the accident. The officers observed defendant lying in the road being treated by paramedics, a moped lying on its side a few feet away from defendant, and a "trail of debris" leading to a nearby stone wall that had "a deep impact . . . that was about the size of what a moped would produce." No other people or vehicles were in the immediate vicinity of the accident, and none of the pedestrians interviewed on the scene reported witnessing the wreck.

¶ 3 When Officer Carssow approached defendant and the paramedics, Officer Carssow smelled a strong odor of alcohol. The smell, in addition to his professional experience responding to late-night single-vehicle accidents, led Officer Carssow to initiate a Driving While Intoxicated (DWI) investigation. However, because of defendant's severe injuries, the officers were not able to conduct standard field sobriety tests at the scene. Instead, Officer Carssow applied for a search warrant to obtain a sample of defendant's blood to check his blood alcohol concentration. Officer Carssow signed the Application for Search Warrant for Bodily Fluids (warrant application) and checked a box that read, "I ascertained that the above-named individual was operating the described vehicle at the time and place stated from the following facts[.]" The subsequent space for further explanation, however, was left blank. Officer Carssow additionally checked the boxes indicating that defendant had previously been convicted of an offense involving impaired driving and that he had detected a strong odor of alcohol coming from defendant's breath at the scene.

¶ 4 Officer Carssow's warrant application was executed and signed by a magistrate. In accordance with the warrant, defendant's blood was drawn by a nurse at the hospital and placed into evidence at the police department. The State Crime Laboratory tested the blood sample and determined that defendant's blood alcohol concentration was 0.13. Defendant was subsequently cited for "unlawfully and willfully operating a (motor) vehicle . . . [w]hile subject to an impairing substance" under N.C.G.S. § 20-138.1.

¶ 5 Defendant's trial was held before a jury on 27 and 28 November 2018 in Superior Court, Buncombe County. As an initial matter, defendant filed a motion to suppress the blood sample evidence obtained as a result of the warrant. Defendant argued that the magistrate "erred in finding probable cause to issue the search warrant" because the information presented in Officer Carssow's affidavit "fails to reveal any information implicating the [d]efendant as the driver of the moped." The trial court denied the motion.

¶ 6 Officer Carssow testified for the State at trial. During Officer Carssow's testimony, the following exchange took place:

> [Prosecutor]: So in a situation like this, you didn't see [defendant] driving, What circumstantial evidence did you believe you had at that time that he was, in fact, the driver of that moped?

> [Officer Carssow]: Correct. Pretty much starting from [defendant] wearing a helmet and having the jacket on—the riding jacket for safety—you know, safety equipment for riding a moped or motorcycle. His position next to the . . . moped. The fact that the moped was owned by him. The . . . extent of his injuries told me that I didn't believe anybody else could have been on scene. The speed at which both EMS and officers arrived on this scene which I believe prohibited—
>
> [Defense counsel]: Objection, your Honor.
>
> [The court]: Overruled.
>
> [Officer Carssow]: Prohibited, you know, too much time passing where other individuals are coming in and out where somebody else riding could have left the scene.

Following this testimony, the State moved to admit the warrant application completed by Officer Carssow into evidence. Defendant did not object. The trial court admitted the warrant application into evidence, and copies were distributed to the jury.

¶ 7 During Officer Carssow's subsequent cross-examination by defense counsel, the following exchange took place:

> [Defense counsel]: So at the point that you went to go get this warrant, you really didn't know if he had driven; correct?
>
> [Officer Carssow]: I had not actually seen him driving. I had done it based upon circumstances.
>
> . . . .
>
> [Defense counsel]: And so when you were filling this out, . . . since you didn't see an individual operating the vehicle, you didn't check [Section] 2A right there? You see what I'm talking about?[1]
>
> [Officer Carssow]: Correct.

1. Section 2A of the warrant application indicates that the officer "*observed* the above-named individual operating the above-described vehicle." (Emphasis added).

> [Defense counsel]: Instead, you checked this section on B; right?[2]
>
> [Officer Carssow]: Mm-hmm. Yes, Ma'am.
>
> [Defense counsel]: And this—what this says right here is that on or about this date, 1:32 AM . . . I responded to a . . . report of a vehicle crash. After arriving at the scene I ascertained that the above-named individual was operating the described vehicle at the time and place stated from the following facts, colon. You see that?
>
> [Officer Carssow]: Yes, Ma'am.

¶ 8 After the State's presentation of evidence, defendant called two witnesses who both testified to being with defendant during the time leading up to the moped accident and that defendant had not been the driver. One witness, Damon Mobley, testified that *he* was driving the moped during the crash and that defendant was a passenger.

¶ 9 On 28 November 2018, the jury found defendant guilty of driving while impaired under N.C.G.S. § 20-138.1. The trial court subsequently sentenced defendant to thirty-six months in the Misdemeanant Confinement Program. Defendant timely appealed.

B. Court of Appeals

¶ 10 Before the North Carolina Court of Appeals, defendant raised two issues. First, defendant argued that the trial court plainly erred by denying his motion to suppress because the warrant application failed to establish probable cause for the search warrant. Second, defendant argued that the trial court erred by admitting Officer Carssow's lay witness opinion that defendant was driving the moped at the time of the accident.

¶ 11 On 31 December 2020, the Court of Appeals issued an unpublished, divided opinion in which it concluded that: (1) defendant waived his right to appellate review concerning the admission of the evidence obtained as a result of the search warrant, but (2) the trial court committed prejudicial error by admitting Officer Carssow's testimony that defendant was driving the moped at the time of the accident. Accordingly, the Court of Appeals vacated defendant's conviction and

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2. Section 2B of the warrant application indicates that the officer "*ascertained* that the above-named individual was operating the described vehicle." (Emphasis added).

remanded the case to the trial court for a new trial. *State v. Delau*, No. COA19-1030, 2020 WL 7974281, at *6 (N.C. Ct. App. Dec. 31, 2020).

¶ 12 First, the Court of Appeals majority held that defendant waived his right to appellate review concerning the admission of the evidence obtained from the search warrant. *Delau*, 2020 WL 7974281, at *3. At trial, defendant "freely entered into a written stipulation with the State that directly referenced the evidence of his blood alcohol concentration obtained from the search warrant" and accordingly consented to the language of the stipulation. *Id.* Further, the Court of Appeals noted, defendant "made no objection to the inclusion of his blood alcohol concentration obtained as a result of the search warrant" in evidence. *Id.* Through his consent, "[d]efendant waived his right to appellate review of any error that may have resulted from the admission and stipulation of the blood alcohol concentration resulting from the search warrant." *Id.*

¶ 13 Second, the Court of Appeals majority held that the trial court committed prejudicial error by admitting Officer Carssow's testimony that defendant was driving the moped at the time of the accident. *Delau*, 2020 WL 7974281, at *5. As an initial matter, the majority determined that defendant sufficiently preserved this issue for appellate review under Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure by timely objecting to Officer Carssow's testimony regarding the factual basis as to why he believed defendant was driving. *Delau*, 2020 WL 7974281, at *3–4.

¶ 14 Next, the majority held that the trial court's admission of Officer Carssow's testimony concluding that defendant was the driver of the moped constituted error under Rule 701 of the North Carolina Rules of Evidence, which limits lay witness testimony "to those opinions or inferences which are . . . rationally based on the perception of the witness." *Delau*, 2020 WL 7974281, at *4 (quoting N.C.G.S. § 8C01, Rule 701 (2019)). Specifically, the majority determined that "it was an abuse of discretion for Officer Carssow to testify [that] [d]efendant was the driver of the moped based on his examination of the scene because he did not personally witness the accident and was not qualified as an expert." *Delau*, 2020 WL 7974281, at *5.

¶ 15 Finally, the majority held that this error was prejudicial. *Id.* at 5. On this point, the majority reasoned that because of the "significant weight" that the jury is likely to give to the testimony of a police officer, the lack of direct evidence from the State that defendant was driving, and the contrary evidence presented by defendant, "there is a reasonable possibility

. . . a different result would have been reached at the trial[.]" *Id.* (alterations in original) (quoting N.C.G.S. § 15A-1443(a) (2019)). Accordingly, the Court of Appeals majority vacated defendant's conviction and remanded the case back to the trial court for a new trial because "[d]efendant was prejudiced when the trial court abused its discretion by admitting Officer Carssow's lay opinion testimony." *Delau*, 2020 WL 7974281, at *6.

¶ 16 Judge Dillon dissented. Although the dissent came to the same conclusion as the majority on the first issue—that defendant waived his right to appellate review concerning the admission of the blood sample evidence—it would have held that the trial court's admission of Officer Carssow's testimony did not constitute reversible error. *Id.* (Dillon, J., dissenting). Specifically, the dissent reasoned that Officer Carssow "was not expressly asked to give a formal opinion as to who was driving the moped. Rather, he was merely asked what circumstantial evidence led him to form his belief that [d]efendant was driving, *at the time* he sought the warrant." *Delau*, 2020 WL 7974281, at *7. Even assuming that Officer Carssow's testimony was improper, though, the dissent would have held that the issue was not preserved for appellate review because "[d]efendant failed to state the grounds of his objection when the testimony was offered . . . [a]nd the grounds are not otherwise obvious in the context of the objection." *Id.* Finally, even assuming that the error was properly preserved for appellate review, the dissent reasoned that any such error was not prejudicial because defendant did not object to the introduction of the warrant, which contained Officer Carssow's "opinion" that defendant was the driver. *Id.*

¶ 17 On 4 February 2021, the State filed its notice of appeal to this Court based on the dissenting opinion below.

C. Present Appeal

¶ 18 Here, the State argues that the Court of Appeals majority erred in its determination that the trial court committed prejudicial error by admitting Officer Carssow's lay opinion testimony and that the Court of Appeals decision should thus be reversed. First, the State argues that the majority erred in concluding that defendant properly preserved his argument regarding the alleged lay opinion testimony of Officer Carssow. The State asserts that defendant failed to provide the basis for his objection to Officer Carssow's testimony and, therefore, the issue was not preserved under Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure, which requires a party to state "the specific grounds for the" desired ruling. The State asserts that defendant provided "only a belated

general objection to Officer Carssow's testimony" during the final portion of questioning about the scene of the moped accident.

¶ 19 Second, the State argues that even if defendant properly preserved this issue for appellate review, the Court of Appeals majority erred in concluding that Officer Carssow's testimony constituted improper lay opinion testimony. The State asserts that Officer Carssow was not giving his opinion on whether or not defendant was driving the moped but rather explaining what circumstantial evidence he relied upon in obtaining the warrant for the defendant's blood.

¶ 20 Third, the State argues that even assuming that the trial court erred in admitting Officer Carssow's testimony, the Court of Appeals majority erred in concluding that the alleged lay opinion testimony was prejudicial and that a new trial was required. The State asserts that other evidence presented at trial prevented defendant from carrying his burden to show that, in the absence of Officer Carssow's testimony, there was "a reasonable possibility that…a different result would have been reached at the trial," quoting N.C.G.S. § 15A-1443(a) (2021). Specifically, the State notes that the warrant application contained functionally the same information as Officer Carssow's testimony regarding his conclusion that defendant was the driver of the moped. And because defendant did not object to the admission of the warrant application at trial, the State contends, any error in admitting Officer Carssow's testimony could not be prejudicial. *See State v. Campbell*, 296 N.C. 394, 399 (1979) ("It is well established that the admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character."). Further, the State points to defendant's own cross-examination of Officer Carssow, which elicited much of the same information. The State concludes that because this other evidence and testimony presented at trial included much of the same information that is at issue in Officer Carssow's testimony, defendant cannot show that a different result would have been reached had Carssow's testimony been excluded, as required by N.C.G.S. § 15A-1443(a).

¶ 21 In response, defendant argues that the decision of the Court of Appeals majority should be affirmed. First, defendant argues that the issue of improper lay opinion testimony was properly preserved by defense counsel's timely objection at trial. Defendant asserts that the reason underlying defense counsel's objection to Officer Carssow's testimony is clear from its context under Rule 10(a)(1). Defendant contends that his objection at trial was prompted by Officer Carssow's repeated use of the word "believe" when testifying as to his reasons for concluding that defendant was the driver of the moped. Accordingly, defendant

argues, it was "apparent from the context" that defense counsel's objection was in direct response to Officer Carssow's improper lay opinion regarding who was driving the moped. *See* N.C. R. App. P. 10(a)(1).

¶ 22 Further, defendant argues that Officer Carssow's testimony was not admissible for any purpose because it was irrelevant and ultimately invaded the province of the jury. Defendant states that even an overruled "general objection" to evidence that could not have been admissible is preserved, citing *State v. Ward*, 301 N.C. 469, 477 (1980). Defendant contends that Officer Carssow's testimony about his belief that defendant was the moped driver faced an admissibility problem, which even the State acknowledges could have been subject to a "proper" objection.

¶ 23 Second, defendant argues that the Court of Appeals majority correctly determined that the trial court erred in admitting Officer Carssow's testimony because a non-expert officer investigating the aftermath of an accident cannot provide the jury with the conclusions he has drawn from his observations of the scene. Defendant notes that "[o]rdinarily, opinion evidence of a non-expert witness is inadmissible because it tends to invade the province of the jury," quoting *State v. Fulton*, 299 N.C. 491, 494, (1980). Although defendant notes that it is appropriate "for an investigating officer to testify as to the condition and position of the vehicles and other physical facts observed by him at the scene of an accident, his testimony as to his *conclusions* from those facts is incompetent," quoting *State v. Wells*, 52 N.C. App. 311, 314 (1981) (emphasis added). Defendant notes that in *McGinnis v. Robinson*, 258 N.C. 264 (1962), this Court held that an investigating officer's testimony about who drove a vehicle in an accident that he did not witness was merely a guess or opinion and therefore not competent evidence, *id.* at 268. Here, defendant contends, Officer Carssow's testimony inappropriately drew inferences from his observations at the scene of the accident, as the jury was just as qualified as Officer Carssow to draw such inferences. Therefore, defendant concludes that the Court of Appeals majority correctly determined that the trial court erred in admitting Officer Carssow's non-expert testimony.

¶ 24 Third, defendant argues that the Court of Appeals majority correctly determined that the admission of this improper lay opinion testimony was prejudicial because it impacted the jury's analysis of the live issue in the case. Defendant asserts that the jury probably gave Officer Carssow's testimony "significant weight." Defendant further contends that the State's argument that Officer Carssow's testimony was essentially the same as the information included in the warrant application is without merit because the warrant application did not include Officer

Carssow's thought process, explanation, or detailed observations. Accordingly, defendant asserts that the Court of Appeals correctly concluded that there is a reasonable possibility of a different result in the absence of the improper evidence under N.C.G.S. § 15A-1443(a).

II. Analysis

¶ 25 Now, this Court must determine: (1) whether defendant properly preserved this issue for appellate review; if so, (2) whether the trial court erred by admitting the testimony in question; and, if so, (3) whether such error was prejudicial. "This Court reviews the decision of the Court of Appeals to determine whether it contains any errors of law." *State v. Melton*, 371 N.C. 750, 756 (2018). As an initial matter, we agree with the Court of Appeals majority and defendant that this issue was properly preserved for appellate review. However, we agree with the Court of Appeals dissent and the State that, assuming that the trial court's admission of the testimony in question was erroneous, it was not prejudicial. Accordingly, we reverse the Court of Appeals decision below.

A. Preservation

¶ 26 **[1]** First, we must consider whether this issue was properly preserved for appeal. Rule 10 of the North Carolina Rules of Appellate Procedure establishes that "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). This specificity requirement "prevents unnecessary retrials by calling possible error to the attention of the trial court so that the presiding judge may take corrective action if it is required. *State v. Bursell*, 372 N.C. 196, 199 (2019). Further, it "contextualizes the objection for review on appeal, thereby enabling the appellate court to identify and thoroughly consider the specific legal question raised by the objecting party." *Id.*

¶ 27 Here, we agree with the Court of Appeals majority below and defendant on appeal that the admissibility of Officer Carssow's testimony was properly preserved for appeal through defense counsel's timely objection at trial. During Officer Carssow's testimony, the parties and the trial court engaged in the following exchange:

> [Prosecutor:] So in a situation like this, you didn't see [defendant] driving. What circumstantial evidence did you believe you had at that time that he was, in fact, the driver of that moped?

> [Officer Carssow:] Correct. Pretty much starting from [defendant] wearing a helmet and having the jacket on—the riding jacket for safety—you know, safety equipment for riding a moped or motorcycle. His position next to the . . . moped. The fact that the moped was owned by him. The . . . extent of his injuries told me that *I didn't believe* anybody else could have been on scene. The speed at which both EMS and officers arrived on the scene which *I believe* prohibited—
>
> [Defense counsel]: Objection, your Honor.
>
> The court: Overruled.
>
> [Officer Carssow]: Prohibited, you know, too much time passing where other individuals are coming in and out where somebody else riding could have left the scene.

¶ 28 As determined by the Court of Appeals majority below, it is reasonably clear from the context of this exchange that defense counsel's objection was raised in immediate response to "Officer Carssow's testimony regarding the factual basis as to why he believed [d]efendant was driving." *Delau*, 2020 WL 7974281, at *4. While defense counsel certainly *could* have clarified the specific grounds for the objection, such specificity is not *required* where, as here, the purpose of the objection is apparent from the context. Further, defense counsel both "call[ed the] possible error to the attention of the trial court" and "contextualize[d] the objection for review on appeal," *Bursell*, 372 N.C. at 199, by objecting as soon as the witness veered from answering the question about circumstantial evidence into the realm of opinion and belief, thus fulfilling the fundamental purposes of the Rule 10(a)(1) requirements. Accordingly, we hold that the grounds of defendant's timely objection were apparent from the context, and thus that defendant properly preserved the underlying issue for appeal.

B. Legal Error

¶ 29 Second, we must consider whether the trial court's admission of Officer Carssow's testimony that defendant was the driver of the moped constituted improper lay witness testimony. "We review the trial court's decision to admit [lay opinion testimony] evidence for abuse of discretion, looking to whether the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result

of a reasoned decision." *State v. Williams*, 363 N.C. 689, 701–02 (2009) (cleaned up).

¶ 30 Rule 701 of the North Carolina Rules of Evidence establishes that

> [i]f [a] witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C.G.S. § 8C-1, Rule 701 (2021). In accordance with this Rule, this Court has held that the testimony of an investigating officer was properly admitted at trial where it was "based on his personal observations" and "helpful to a clear understanding of his testimony" concerning the facts in question. *See, e.g.*, *State v. Dickens*, 346 N.C. 26, 46 (1997); *State v. Lloyd*, 354 N.C. 76, 109 (2001).

¶ 31 Here, we assume without deciding that Officer Carssow's testimony noted above constituted an improper lay opinion under Rule 701 and therefore that the trial court erred in admitting the testimony. Because such assumed error would only require correction if prejudicial, we now proceed directly to the prejudice analysis.

C. Prejudice

¶ 32 **[2]** Third, we must consider whether this assumed error was prejudicial to defendant. Even assuming error, "evidentiary error does not necessitate a new trial unless the erroneous admission was prejudicial." *State v. Wilkerson*, 363 N.C. 382, 415 (2009). "A defendant is prejudiced by evidentiary error when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at . . . trial . . . ." *Id.* (cleaned up); *see* N.C.G.S. § 15A-1443(a) (2021) (establishing this standard). "The burden of showing . . . prejudice under [N.C.G.S. § 15A-1443(a)] is upon the defendant." N.C.G.S. § 15A-1443(a) (2021). Further, if certain evidence is admitted without objection, the admission of subsequent evidence of similar a character cannot be objectionable. *See Campbell*, 296 N.C. at 399.

¶ 33 Here, assuming *arguendo* that the admission of Officer Carssow's testimony was erroneous, we determine that defendant has not met his burden of showing prejudice because other admitted evidence included substantially similar information. First, defendant did not object to the introduction of the warrant application, which was admitted into evidence and published to the jury. The warrant application, signed by Officer

Carssow, definitely stated Carssow's conclusion that the defendant was "operating the" moped. Next, defendant's own cross-examination of Officer Carssow brought out much of the same information because defendant quoted from the warrant application where defendant was identified as the driver of the moped. Specifically, defense counsel's exchange with Officer Carssow during cross-examination noted that Officer Carssow's conclusion regarding who was driving the moped was "based upon circumstances," and that Officer Carssow "ascertained that [defendant] was operating the described vehicle at the time and place stated."

¶ 34 To be sure, it is reasonable to assume that the testimony of a police officer at trial will be afforded significant credibility and weight by the jury. Here, however, even if Officer Carssow's testimony was given significant weight by the jury, very similar evidence—to the effect that defendant was the moped driver was admitted without objection through the warrant application and the defendant's own cross-examination. Defendant did not meet his burden in showing that had Officer Carssow's testimony not been admitted, a different result would have been reached as required by N.C.G.S. § 15A-1443(a). Accordingly, we hold that even assuming that the trial court erred in admitting the testimony in question, such error was not prejudicial.

III. Conclusion

¶ 35 We agree with the Court of Appeals majority below and defendant on appeal that Officer Carssow's testimony was properly preserved for appeal. However, assuming *arguendo* that the admission of Officer Carssow's testimony was erroneous under Rule 701, we hold that defendant has not met his burden of showing that such assumed error was prejudicial where other evidence properly admitted at trial established substantially the same thing. Accordingly, we reverse the decision of the Court of Appeals.

REVERSED.

THE CHERRY COMMUNITY ORGANIZATION,
A NORTH CAROLINA NON-PROFIT CORPORATION, AND STONEHUNT, LLC
v.
STONEY D. SELLARS, MIDTOWN AREA PARTNERS HOLDINGS, LLC,
AND MIDTOWN AREA PARTNERS II, LLC

No. 141PA20

Filed 6 May 2022

Real Property—good faith purchaser for value—fraudulent intention—imputation of knowledge—agency principles

In plaintiff's action pursuant to the Uniform Voidable Transactions Act—in which plaintiff, a nonprofit community organization, challenged a real estate transfer of land which it had previously owned and to which it had a potential claim under a separate lawsuit—defendants were not entitled to the protections afforded good faith purchasers for value where they purchased the land in a private sale from another developer with which defendants had formed a joint real estate development venture. Pursuant to principal-agent law and the doctrine of imputed knowledge, defendants were charged with the knowledge of their co-principal's fraudulent intent to shield the land from plaintiff as a creditor, which was accomplished by transferring title of the subject property—the co-principal's last substantial asset—to defendants without public notice, appraisal, or negotiation during the pendency of plaintiff's appeal from the related lawsuit.

Justice BARRINGER concurring in part and dissenting in part.

Chief Justice NEWBY joins in this concurring in part and dissenting in part opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished opinion of the Court of Appeals, No. COA19-695, 2020 WL 774020 (N.C. Ct. App. Feb. 18, 2020), affirming a judgment entered on 31 December 2018 by Judge Eric L. Levinson in Superior Court, Mecklenburg County. Heard in the Supreme Court on 4 October 2021.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Scott A. Miskimon, Kerry A. Shad, and J. Mitchell Armbruster, for plaintiff-appellant Cherry Community Organization.

Alexander Ricks PLLC, by Roy H. Michaux Jr. and Matthew T. Houston, for defendant-appellees Midtown Area Partners Holdings, LLC and Midtown Area Partners II, LLC.

MORGAN, Justice.

¶ 1 This Court allowed plaintiff's Petition for Discretionary Review in order to examine a unanimous opinion of the Court of Appeals which affirmed a trial court's judgment dismissing plaintiff's lawsuit which lodged claims against defendants under North Carolina's Uniform Voidable Transactions Act (UVTA). The trial court concluded, and the Court of Appeals agreed, that defendants were good faith purchasers for value and thus possessed a legitimate defense against plaintiff's claims under the UVTA. However, the trial court's unchallenged findings of fact require the application of common law agency principles which operate to remove the protection of the good faith purchaser defense from defendants. Therefore, the decision of the Court of Appeals is reversed in part, and the judgment of the Superior Court, Mecklenburg County, entered on 31 December 2018 in which it dismissed plaintiff's UVTA claims against defendants is vacated and this case remanded for further proceedings in accordance with this opinion.

I. Factual and Procedural Background

¶ 2 Plaintiff The Cherry Community Organization is a North Carolina nonprofit entity dedicated to the preservation and enhancement of an area of Charlotte known as Cherry, a historic Black, working-class neighborhood near the city's uptown district. Plaintiff organization is comprised of occupants of properties within the Cherry community and leases affordable housing units which plaintiff owns to low-income, disabled, and senior residents, some of whom have lived there for generations. In furtherance of this mission, plaintiff began contracting with an individual named Stoney Sellars and his real estate development company StoneHunt, LLC in 2004 in order to develop affordable housing units on several acres of land which plaintiff owned in the Cherry neighborhood. Under the ensuing contracts, StoneHunt obtained title to eight acres of prime real estate owned by plaintiff near the center of Charlotte at below-market rates in exchange for a promise that StoneHunt would develop certain parcels of the land into housing units for low-income, disabled, and senior occupants. However, StoneHunt failed to build all of the affordable housing units which it pledged, instead maneuvering to sell most of the land conveyed to StoneHunt by plaintiff under the contract to market-rate residential builders in May 2014 for an enormous

profit. Of the land conveyed to StoneHunt by plaintiff under the original contract, StoneHunt retained only a half-acre parcel. Adjacent to this half-acre parcel was another quarter-acre parcel which StoneHunt also owned but that was otherwise unrelated to StoneHunt's unfulfilled contractual obligations to plaintiff. Together, these two parcels are identified in this matter as the "subject property."

¶ 3 Defendants Midtown Area Partners Holdings, LLC and Midtown Area Partners II, LLC (MAP) are real estate development businesses which share identical ownership. Defendants' principals are sophisticated, informed real property and financial investment professionals who have heightened knowledge about the marketplace and land values.[1] One of defendants' principals approached Sellars twice during the 2012–2013 time period in order to probe StoneHunt's willingness to sell the subject property to MAP. Defendants' representative explained that MAP owned adjacent parcels to the subject property and remarked that it did not appear that StoneHunt was in the process of developing the land at issue despite a sign from 2008 which was situated on the property stating, "Town Homes Coming." Sellars denied the occurrence of such overtures. Defendants' agent then proposed that StoneHunt and MAP work together in developing the subject property which StoneHunt controlled and the adjacent parcels that defendants owned. The two entities, through their respective actors, entered into an operating agreement to develop these contiguous properties into a $50 million mixed-use project in March 2014. Extending from the creation of this arrangement until its termination, defendants and StoneHunt were the principals of a general partnership engaged in a joint venture for the development of the mixed-use project, with defendants enjoying an insider status to StoneHunt's dealings with the subject property.

¶ 4 Having discovered StoneHunt's breach of its contract with plaintiff to construct the affordable housing units in a collaborative approach on the acreage conveyed by plaintiff to StoneHunt in the 2004 conveyance, plaintiff filed suit against StoneHunt and its principal Sellars on 10 September 2015 for breach of contract and violations of the North Carolina Unfair and Deceptive Trade Practices Act (the first lawsuit). The first lawsuit sought monetary damages and the recovery of title to the portion of the subject property which plaintiff had deeded to StoneHunt under the 2004 contract and was accompanied by a Notice of Lis Pendens that was filed in the county clerk's office the same day

1. In addressing this case in a manner to promote clarity, the term "defendants" collectively refers to the two MAP entities which are named parties in this action as well as their respective principals who are identical, yet unnamed in the underlying lawsuit.

concerning this part of the subject property. Plaintiff delivered copies of the complaint and Notice of Lis Pendens simultaneously to defendants' attorney. Defendants contemplated the potential effects which the first lawsuit could have on the viability of the joint project of defendants and StoneHunt, leading to communications with Sellars and StoneHunt about the authority of plaintiff's board members to prosecute the first lawsuit, StoneHunt's legal strategy in countering plaintiff's claims, and the financial impact on defendants' and StoneHunt's joint venture as a result of the Notice of Lis Pendens. Defendants were not involved otherwise with StoneHunt's defense of the first lawsuit. The first lawsuit was dismissed in February 2016 by order of the trial court pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure and the Notice of Lis Pendens was cancelled by another order of the trial court in May 2016. Plaintiff timely appealed the trial court's orders which, taken together, effectively halted the first lawsuit.

¶ 5 During the pendency of plaintiff's appeal to the Court of Appeals and at the behest of StoneHunt, one of defendants' principals submitted to the lower appellate court an affidavit in opposition to plaintiff's appeal, lamenting that the development of the subject property would "be delayed and thus damaged by a cloud on the title to two of the StoneHunt parcels" due to the Notice of Lis Pendens filed by plaintiff. On 17 June 2016—approximately one week after the affidavit—plaintiff's counsel sent a letter to defendants' counsel which expressed confidence that the Court of Appeals would reverse the trial court's dismissal of the first lawsuit and the trial court's cancellation of the Notice of Lis Pendens, and reminded defendants that litigation against StoneHunt was still pending, thus putting title to the subject property "at issue." The letter concluded with an admonition from plaintiff's counsel that if StoneHunt and defendants continued with plans to develop or convey the subject property, they did so "strictly at their own risk and peril." A few months later, in September 2016, although StoneHunt had represented the subject property to be worth $2.5 million, nevertheless the real estate development company offered to sell the subject property to defendants outright for $1.1 million. Sellars explained that this sudden shift in his company StoneHunt's involvement with the subject property and the accompanying mixed-use project was inspired by Sellars's desire to spend more time looking after his family and growing information technology business, even though Sellars's continued involvement with the multi-use development would have yielded far greater monies than a direct sale to defendants without any substantial work on Sellars's part. The following week, notwithstanding defendants' belief that the

value of the subject property rested somewhere between $600,000 and $800,000, defendants orally agreed to purchase the subject property for StoneHunt's offering price of $1.1 million but on different terms than those offered by StoneHunt.

¶ 6 In late October 2016, plaintiff's counsel sent defendants' counsel a calculation of damages totaling $1,694,000 which plaintiff reasonably expected to obtain in an eventual judgment against StoneHunt—not including interest, attorney's fees, and potential treble damages—in the event that plaintiff prevailed in its lawsuit. The oral arguments in plaintiff's appeal were presented in the Court of Appeals on 28 November 2016. On the following day, in recognizing that the Court of Appeals would possibly issue an opinion in favor of plaintiff and potentially reinstate the first lawsuit, StoneHunt's counsel sent an electronic mail to defendants explaining that they should expect the Court of Appeals decision "fairly quickly" and advising "everyone to try to get this done as soon as possible," referring to the completion of the sale of the subject property which had yet to be reduced to writing.

¶ 7 Based upon a mutual trust established through the parties' relationship as business partners, StoneHunt and defendants agreed to fully conceal their pending land transaction until it was too late for plaintiff to attempt to prevent the sale. Instead of placing the subject property on the open market, StoneHunt and defendants agreed to an insider sale, wherein the availability of the subject property to be purchased from StoneHunt would not be publicized and defendants' knowledge of the land's availability for purchase was due to their special relationship with StoneHunt. There was no appraisal of the land's value which was performed, and the parties did not negotiate about the transaction price. On 8 December 2016—nine days after the electronic mail correspondence which StoneHunt's counsel sent to defendants which advised that the subject property transfer needed to be "done as soon as possible" lest an unfavorable ruling from the Court of Appeals on plaintiff's appeal of the first lawsuit erect a formidable barrier to the ability to consummate the land transaction involving the subject property—StoneHunt and defendants signed a contract for the sale of the subject property (the purchase contract) through their respective agents, with Sellars executing the contract on StoneHunt's behalf. The purchase contract included a provision that, because of certain circumstances, defendants were "not willing to pay full market value" for the subject property. After multiple amendments, the final terms of the purchase contract provided that StoneHunt would disclose to defendants any filings which it already had, or would receive, from plaintiff in the continuing first lawsuit, and

that the joint venture between StoneHunt and defendants would be dissolved contemporaneous with the delivery of a deed to the subject property by StoneHunt to defendants. The purchase contract further provided that, in light of the first lawsuit, and in order to encourage the resolution of the "differences" between plaintiff and StoneHunt, defendants would pay $200,000 of the purchase price at closing and issue a promissory note for the remaining $900,000 which would be payable one year later. There was also a "gentlemen's agreement" between defendants and StoneHunt that there would be a "principal pay down" of $200,000 against the $900,000 promissory note upon a dismissal of plaintiff's *lis pendens* appeal. This term was excluded from the written purchase contract because defendants' counsel feared that it would be discoverable and defendants "didn't want to get caught up in the litigation."

¶ 8 On 30 December 2016, the Court of Appeals issued an opinion reversing the trial court's dismissal of plaintiff's first lawsuit for StoneHunt's alleged breach of contract and alleged violation of the Unfair or Deceptive Trade Practices Act (UDTPA). Having reinstated plaintiff's first lawsuit, the Court of Appeals dismissed plaintiff's appeal of the trial court's cancellation of the Notice of Lis Pendens as interlocutory. Therefore, as of January 2017, defendants knew that plaintiff's first lawsuit had been revived, defendants and StoneHunt had not yet consummated the proposed conveyance of the subject property, and the Notice of Lis Pendens clouding a portion of the subject property had not been reinstated. Irrespective of these circumstances, on 2 February 2017, StoneHunt and defendants formally closed their real estate transaction, with StoneHunt signing and delivering a deed to defendants which transferred ownership of the subject property to defendants in exchange for the $200,000 down payment and the $900,000 promissory note. On the same day the transaction closed, StoneHunt and defendants signed an agreement which dissolved the joint venture between them. StoneHunt then divided the $200,000 which it received at closing between StoneHunt's counsel for outstanding legal fees and Sellars for an amount owed by StoneHunt to him, leaving the $900,000 promissory note and a small amount of funds as StoneHunt's sole remaining assets.

¶ 9 Upon learning of the insider sale of the subject property from StoneHunt to defendants, plaintiff initiated legal action against defendants on 30 August 2017 seeking, among other things, avoidance of the transfer of the subject property and the accompanying sale proceeds, as well as a judgment against defendants in the amount of the value of the subject property at the time of its transfer by StoneHunt for defendants'

alleged violation of the UVTA[2] (the second lawsuit). *See* N.C.G.S. §§ 39-23.1 to 39-23.12 (2021). While taking the position that StoneHunt had transferred title to the subject property to defendants in an effort to defraud plaintiff of an opportunity to reach this asset as a creditor, plaintiff asserted in its complaint that defendants were not good faith purchasers for value of the subject property, and therefore defendants could not claim the protection of the UVTA which is afforded to good faith transferees. Following a lengthy jury trial in the first lawsuit which resulted in a verdict for plaintiff, StoneHunt and plaintiff entered into a consent judgment by which plaintiff would be entitled to recover from StoneHunt's bankruptcy estate over $7 million in damages, interest, and attorney's fees.[3]

¶ 10 On 21 May 2018, almost nine months after the filing of the original complaint, plaintiff filed a motion to amend its complaint against defendant Midtown Area Partners Holdings, LLC in order to add a claim under the UDTPA found in Chapter 75 of the North Carolina General Statutes. Concurrently, plaintiff amended its complaint against defendant Midtown Area Partners II, LLC as a matter of right to include a claim under the UDTPA. The trial court denied plaintiff's motion to amend its complaint against Midtown Area Partners Holdings, LLC on 19 July 2018, concluding that there had "been undue delay with respect to pursuing this claim." A nine-day bench trial in plaintiff's second lawsuit concluded on 30 July 2018.

¶ 11 The trial court entered a judgment dismissing plaintiff's second lawsuit, including plaintiff's UVTA claims against both defendant's and plaintiff's singular UDTPA claim against Midtown Area Partners II, LLC, on 31 December 2018. In its judgment, the trial court included extensive, expansive findings of fact and conclusions of law which detailed a calculated scheme by Sellars and StoneHunt to fraudulently liquidate the subject property and to hide the monetary proceeds from legitimate creditors. Despite its express recognition of the width and depth of StoneHunt's fraud, the trial court nonetheless concluded that defendants "acted in a commercially reasonable manner" in their acquisition of the property and "did not engage in fraudulent activities." The trial court further concluded that defendants had "established and met

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2. Prior to 1 October 2015, the UVTA was known as the Uniform Fraudulent Transfer Act and is mentioned as the Uniform Fraudulent Transfer Act in plaintiff's verified complaint despite the complaint being filed subsequent to the law's name change. *See* N.C.G.S. § 39-23.12 (2021).

3. StoneHunt filed for Chapter 11 bankruptcy in the Western District of North Carolina on 29 August 2018.

its burden of proof to show that it was a good faith purchaser of the Subject Property,"[4] and lamented that its decision and its designation of defendants as good faith purchasers would likely leave plaintiff with little recourse in collecting the $7 million owed by StoneHunt to plaintiff for StoneHunt's breach of their 2004 contract. The trial court dismissed plaintiff's second lawsuit with prejudice and declared that the Notice of Lis Pendens was ineffectual. Plaintiff timely filed its notice of appeal from the trial court's judgment of 31 December 2018.

¶ 12 The Court of Appeals issued a unanimous, unpublished opinion affirming the trial court's dismissal of plaintiff's second lawsuit against defendants on 18 February 2020. *Cherry Cmty. Org. v. Sellars*, No. COA19-695, 2020 WL 774020, at *1 (N.C. Ct. App. Feb. 18, 2020). Plaintiff petitioned this Court for discretionary review of the Court of Appeals decision. We allowed plaintiff's petition for discretionary review on 15 December 2020.

II. Analysis

¶ 13 Plaintiff's request for this Court's exercise of discretionary review asks us to determine whether the trial court and the Court of Appeals committed an error of law in concluding that defendants were good faith purchasers for value where defendants were co-principals in a joint real estate development venture with a party which intended to defraud creditors by way of the party's insider conveyance to defendants of the real estate property at issue. We conclude that defendants were imputed with the knowledge of their co-principal's fraudulent intent by virtue of the principal-agent relationship which existed between the parties pursuant to common law. Therefore, the Court of Appeals erred in affirming the trial court's determination that defendants were good faith purchasers of the subject property.

A. Standard of Review

¶ 14 "A trial court's unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." *Cape Fear River Watch v. N.C. Env't Mgmt. Comm'n*, 368 N.C. 92, 99 (2015) (extraneity omitted). Otherwise, a trial court's findings of fact are conclusive on appeal if supported by any competent evidence.

4. As noted in the opinion of the Court of Appeals in this case, and as further discussed below, the trial court's conclusion to the effect that defendants were good faith purchasers of the subject property would typically be treated as a finding of fact instead of a conclusion of law, which would in turn alter the standard of review which is normally applicable to such a determination. *Bledsole v. Johnson*, 357 N.C. 133, 138 (2003). However, the legal standard by which the trial court reaches this finding remains a question of law. *Id.*

E. Carolina Reg'l Hous. Auth. v. Loftin, 369 N.C. 8, 11 (2016). "Whether a party has acted in good faith is a question of fact for the trier of fact, but the standard by which the party's conduct is to be measured is one of law." *Bledsole v. Johnson*, 357 N.C. 133, 138 (2003) (citation omitted). Questions of law are reviewed de novo, and "[w]hen considering a case on discretionary review from the Court of Appeals, we review the decision for errors of law." *Irving v. Charlotte-Mecklenburg Bd. of Educ.*, 368 N.C. 609, 611 (2016).

B. The Uniform Voidable Transactions Act, the Good Faith Defense, and Imputation of Knowledge Under Agency Principles

¶ 15 The UVTA "was not designed to permit those dealing in the commercial world to obtain rights by an absence of inquiry under circumstances amounting to an intentional closing of the eyes and mind to defects in or defenses to the transaction." *Branch Banking & Tr. Co. v. Gill*, 293 N.C. 164, 189 (1977). Instead, the UVTA renders "voidable as to a creditor" any "transfer made or obligation incurred" when that transfer—in this case, the conveyance of the subject property—is consummated by a debtor with the "intent to . . . defraud any creditor of the debtor." N.C.G.S. § 39-23.4(a) (2021). In the present case, it is worthy of note that a creditor who is successful in a UVTA claim may obtain avoidance of the transfer of the real property to the extent necessary to satisfy the creditor's claim and may recover judgment for the value of the asset transferred against "[t]he first transferee of the asset" or "[a]n immediate or mediate transferee of the first transferee." N.C.G.S. §§ 39-23.7(a)(1), 39-23.8(b)(2) (2021). However, N.C.G.S. § 39-23.8(a) establishes that a transfer—such as one made by the debtor with the intent to defraud any creditor of the debtor—is not voidable against a transferee "that took in good faith and for a reasonably equivalent value given the debtor." N.C.G.S. § 39-23.8(a). Parties such as defendants in the instant case which rely upon this statutory protection afforded to qualifying transferees have the burden of proving the applicability of N.C.G.S. § 39-23.8(a) by a preponderance of the evidence. N.C.G.S. § 39-23.8(g)(1), (h).

¶ 16 Here, defendants were charged with the burden to prove in plaintiff's second lawsuit against them that defendants both (1) took title to the subject property in good faith from StoneHunt, which was defendants' co-principal in the joint real estate development venture, *and* (2) bought the subject property for a reasonably equivalent value which it gave to the debtor StoneHunt. While the trial court made some findings of fact which were unchallenged on appeal and hence are binding on this Court, and made still other findings of fact that are deemed

conclusive for our review because they are supported by competent evidence, nonetheless the trial court was remiss in failing in its conclusions of law to consider the imputation of knowledge to defendants of StoneHunt's fraudulent conduct in StoneHunt's cunning tactic, as plaintiff's debtor, in manipulatively conveying title to the acres of the subject property which were owned by plaintiff to defendants in an effort to prevent StoneHunt's creditors from satisfying a potential judgment through acquisition of the subject property themselves. In applying the statutory law and the pertinent case law to the current matter, we determine that the facts and circumstances here, when viewed as a whole, lead to the imputation of knowledge on the part of defendants that their business partner StoneHunt had engaged in fraudulent activity by obfuscating plaintiff's access to the subject property which StoneHunt had finagled from the sole ownership of plaintiff years ago. Consequently, defendants did not meet their burden of proof to show that they were a good faith purchaser of the subject property and that they paid a reasonably equivalent value for the land. In deciding as a conclusion of law that defendants met this statutory burden of proof, the trial court erred; subsequently, the Court of Appeals erred in affirming the trial court's judgment. We now reverse this outcome.

¶ 17 Fundamentally, the doctrine of imputed knowledge establishes the rule that "a principal is deemed to know facts known to his or her agent if they are within the scope of the agent's duties to the principal, unless the agent has acted adversely to the principal." *Doctrine of Imputed Knowledge*, Black's Law Dictionary (11th ed. 2019). Under this common law doctrine, a party is charged with knowledge attributed to a given person, especially because of the person's legal responsibility for another's conduct. *Imputed Knowledge*, Black's Law Dictionary (11th ed. 2019). As the Supreme Court of the United States stated in *Curtis*, *Collins & Holbrook Co. v. United States*, 262 U.S. 215, 222–23 (1923), "[t]he general rule is that a principal is charged with the knowledge of the agent acquired by the agent in the course of the principal's business." In North Carolina, "[e]very partner is an agent of the partnership for the purpose of its business." N.C.G.S. § 59-39(a) (2021). The creation of a business partnership "constitut[es] each member an agent of the others in matters appertaining to the partnership and within the scope of its business." *Rothrock v. Naylor*, 223 N.C. 782, 786 (1944).

¶ 18 In the case before us, defendants and StoneHunt were business partners engaged in a joint venture to develop the subject property by erecting a mixed-use project. As co-principals in this capitalistic endeavor, both parties in this real estate development were recognized as agents

for one another—in the statutory law under N.C.G.S. § 59-39(a) and the case law under *Rothrock*—in matters which involved the purpose and scope of the business partnership. A representative of defendants expressly proposed to StoneHunt's Sellars that StoneHunt and defendants combine their respective resources to build the mixed-use project on the adjoining lands of the subject property—in which StoneHunt held control—and neighboring parcels—in which defendants held control. StoneHunt's subsequent relinquishment of the subject property was in furtherance of the purpose and scope of its business partnership with defendants. Pursuant to the principles of this state's statutory law regarding elements of partnership and of the doctrine of imputed knowledge, fortified by the aforementioned declaration of the nation's highest court in *Curtis*, *Collins & Holbrook Co.*, defendants are charged with the knowledge of StoneHunt's fraudulent relinquishment of title to the subject property, as defendants are deemed to know the facts which are known by StoneHunt regarding StoneHunt's desire to convey the subject property prior to the subject property being reached by plaintiff, in its capacity as StoneHunt's creditor, to satisfy plaintiff's $7 million judgment against StoneHunt. While the doctrine of imputed knowledge does not apply in the event that an agent acts adversely to the principal's interests, which the Supreme Court of the United States amplified in a circumstance known as the "adverse interest" exception when the highest forum opined in *Curtis*, *Collins & Holbrook Co.* that the doctrine does not apply "when the agent's attitude is one adverse in interest to that of the principal, because of which it cannot be inferred that the agent would communicate the facts against his own interest to his principal," *Curtis*, *Collins & Holbrook Co.*, 262 U.S. at 223, there is no evidence in the record, nor any legal argument advanced by defendants, that an adverse interest between StoneHunt and defendants existed regarding their business partnership to develop the subject property in general, or StoneHunt's dishonest acquisition of the title to the subject property and StoneHunt's later fraudulent conveyance of the subject property to defendants in particular. Therefore, the application of the doctrine of imputed knowledge, in conjunction with the applicable statutory law and case law, remains intact to apply to defendants' awareness of StoneHunt's fraudulent actions in obtaining title to the subject property which was originally owned by plaintiff.

¶ 19 In the federal case of *Chrysler Credit Corporation v. Burton*, 599 F. Supp. 1313 (M.D.N.C. 1984), a creditor filed a complaint against its debtor and others in an effort to have the trial court to set aside two conveyances of real estate used as business property because the title transfers were fraudulently made by the debtor. The debtor "retained

substantially no assets" at the time that the property was conveyed because "the piece of land was his principal asset." *Chrysler Credit Corp.*, 599 F. Supp. at 1316. The federal district court, in exercising jurisdiction in this matter, applied North Carolina's fraudulent conveyance law in reaching its determination. *See id.* at 1317. The trial court began its analysis by noting: "In a diversity case the Court enforcing state enacted rights must apply the law of North Carolina as declared by its legislature in a statute or by the North Carolina Supreme Court in a decision." *Id.* at 1316.

¶ 20 In recognizing that "North Carolina fraudulent conveyance law has as its cornerstone the venerable case of *Aman v. Walker*, 165 N.C. 224, 81 S.E. 162 (1914)," the federal district court stated that "[a]ccording to *Aman* when a conveyance is made by a debtor for valuable consideration, it is fraudulent and may be set aside only when the conveyance was (1) made with the intent to defraud creditors and (2) the grantee either participated in the intent or *had notice of it*." *Id.* at 1317 (emphasis added) (quoting *Edwards v. Nw. Bank*, 39 N.C. App. 261, 269 (1979)). After citing this Court's decision in *Arrington v. Arrington*, 114 N.C. 151 (1894), as the source for the pronouncement that "[e]ither actual or constructive notice of the grantor's fraud is sufficient to deny protected status to a grantee[,]" *id.*, the trial court went on to determine the "conveyance to be a fraudulent conveyance and therefore invalid as to creditors." *Id.* at 1321. In "[c]laiming protection under North Carolina registration law," a third-party banking institution's deed of trust was deemed by the trial court to be "protected from avoidance under fraudulent conveyance law." *Id.* at 1319.

¶ 21 While not dispositive of the outcome of the instant case's presentation of the fundamentally identical issues raised in *Chrysler Credit Corporation*, nonetheless the federal district court's discussion and application of our case law decisions regarding their impact upon a debtor's fraudulent acts regarding title to real property, the debtor's significant reduction in assets after the fraudulent acts which occasioned the conveyance, the state trial court's ability to set aside a real property conveyance which was marked by fraud, and the status of the grantee of the real property as a protected good faith purchaser is highly instructive and persuasive in our analysis of this matter. The federal district court's observation in *Chrysler Credit Corporation* that the "[p]laintiff retained . . . considerably less [assets] than the requirement that sufficient assets be retained" in leading to the tribunal's view that "no lender would extend credit for the amount of the existing debt with such security as the assets the defendant . . . retained[,]" *id.* at 1320, is germane to our evaluation of the factor in the present case wherein StoneHunt

had divested itself of its chief financial asset in the form of the subject property in the event that plaintiff, as StoneHunt's creditor, was successful in plaintiff's lawsuit against StoneHunt. Likewise, the federal district court's conclusion that the grantee of the land conveyance had notice of the grantor's fraud so as to negate the grantee's protected status and to invalidate the conveyance as to creditors is pertinent to our assessment of the situation in the present case wherein defendants claim to possess protected status as the grantee of their joint venture business partner StoneHunt's conveyance of the subject property in the face of the pending claims against StoneHunt by plaintiff as StoneHunt's creditor.

C. Consideration of Subsection 39-23.4(b) of the General Statutes of North Carolina

¶ 22 Our determination that the trial court erred in its conclusions of law, and subsequently that the Court of Appeals erred in affirming the trial court's judgment which resulted from these conclusions of law, is buttressed by this Court's examination of the factors which are delineated in N.C.G.S. § 39-23.4(b). While referenced earlier, N.C.G.S. § 39-23.4(a)(1) reads in its entirety as follows:

> (a) A transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (1) With intent to hinder, delay, or defraud any creditor of the debtor . . . .

N.C.G.S. § 39-23.4(a) (2021).

¶ 23 As a preface to identifying thirteen factors to which, "[i]n determining intent under subdivision (a)(1) of this section, consideration may be given, among other factors[,]" N.C.G.S. § 39-23.4(b) lists these circumstances to be utilizable as potentially helpful guidelines. The words employed in this statutory introduction to the factors indicate that they are not intended to be mandatory nor exclusive. In examining these factors, this Court recognizes that it must refrain, as previously stated, from disturbing any of the trial court's findings of fact which are unchallenged as well as those which are supported by any competent evidence. This Court is also aware of the standard espoused in *Shepard v. Bonita Vista Properties, L.P.*, 191 N.C. App. 614 (2008), *aff'd per curiam*, 363 N.C. 252 (2009), with which we reiterate our agreement that "[w]hen the trial court sits without a jury, as it did in this case, 'the standard of review

on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts.' " 191 N.C. App. at 616.

¶ 24 While honoring these limitations upon appellate review, we still identify the existence of six of the thirteen factors[5] upon our de novo review of the Court of Appeals decision for errors of law which it committed upon affirming the trial court's judgment, which included the trial court's failure to address in its conclusions of law the matter of the imputation of knowledge to defendants of StoneHunt's fraudulent conduct regarding the conveyance of the subject property to defendants which had belonged to plaintiff. We conclude that the imputation of knowledge to defendants of those facts which were known to StoneHunt at the time of the conveyance operates to defeat defendants' claim that it was a good faith purchaser for value of the land at issue.

¶ 25 Upon our review, this Court considers the following statutory factors expressly mentioned in N.C.G.S. § 39-23.4(b) to be invoked with regard to StoneHunt's intent to defraud plaintiff, in plaintiff's capacity as a creditor of its debtor StoneHunt, so as to render voidable, as to the creditor plaintiff, its debtor StoneHunt's transfer of title to the subject property to defendants because defendants are deemed to be imputed with the knowledge of their business partner StoneHunt that StoneHunt's transfer of title to defendants was made with the intent to defraud plaintiff.

1. Subsection (b)(1): The transfer or obligation was to an insider.

¶ 26 Collectively, defendants, as the grantee of the subject property, were insiders of StoneHunt when the transfer of title was made to defendants.

2. Subsection (b)(3): The transfer or obligation was disclosed or concealed.

¶ 27 StoneHunt concealed its sale of the subject property to defendants. StoneHunt did not disclose to plaintiff the sale of the subject property

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5. Of the thirteen statutory factors, only eleven of them were in position to be actively considered. Firstly, the factor contained in N.C.G.S. § 39-23.4(b)(11), "The debtor transferred the essential assets of the business to a lienor that transferred the assets to an insider of the debtor" is preempted by the utilization of N.C.G.S. § 39-23.4(b)(1) because the conveyance at issue was directly from StoneHunt to defendants, rather than from StoneHunt to another party which, in turn, transferred the land to defendants. Secondly, the factor addressed in N.C.G.S. § 39-23.4(b)(13), "The debtor transferred the assets in the course of legitimate estate or tax planning" is not relevant, with the subject matter of real estate constituting the focus here.

until after defendants took title to the land. The concealment was instituted by StoneHunt at a time when plaintiff's claims against StoneHunt in the first lawsuit were reinstated by the Court of Appeals. StoneHunt's eventual disclosure to plaintiff of the transfer was performed in order for StoneHunt to gain an advantage in the reactivated litigation.

3. Subsection (b)(4): Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.

¶ 28 Plaintiff filed the first lawsuit against StoneHunt on 10 September 2015. The transfer of title to the subject property was made by StoneHunt to defendants on 2 February 2017. Plaintiff's appeal of the dismissal of the first lawsuit was pending at the time of the negotiation, and the Court of Appeals opinion which reversed the dismissal of plaintiff's lawsuit against StoneHunt and reinstated the action was issued on 30 December 2016, more than a month prior to the transaction's consummation.

4. Subsection (b)(5): The transfer was of substantially all the debtor's assets.

¶ 29 The subject property which StoneHunt transferred to defendants was the real estate development company's sole remaining real estate asset at the time, and StoneHunt only had a small amount of cash on hand. With the exception of the cash and the $900,000 promissory note which defendants issued to StoneHunt which became due one year from its creation, StoneHunt had a weak financial condition and no remaining assets. The subject property was StoneHunt's last substantial asset before plaintiff's claims were reinstated.

5. Subsection (b)(8): The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.

¶ 30 StoneHunt's agent, Sellars, proposed that defendants purchase the subject property for $1.1 million, which was significantly less than half of the $2.5 million value of the land that agent Sellars represented as the land's worth.

6. Subsection (b)(9): The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.

¶ 31 Subsequent to the debtor StoneHunt's transfer of the title to the subject property to defendants on 2 February 2017 which left StoneHunt

with only a small amount of cash money and a $900,000 promissory note as StoneHunt's remaining assets, StoneHunt filed for bankruptcy on 29 August 2018. StoneHunt had not been able to pay its bills as they became due, and very soon after StoneHunt transferred the subject property, a fair evaluation of StoneHunt's debts exceeded the value of its assets. In coupling our assessment of the presence and persuasiveness of these statutory factors enumerated in N.C.G.S. § 39-23.4(b) with additional non-statutory factors which we find existent and enlightening in the present case concerning the determination of StoneHunt's intent to defraud its creditor—here, plaintiff—under N.C.G.S. § 39-23.4(a)(1) and the imputation of knowledge of the facts as StoneHunt knew them at the time of StoneHunt's implementation of the debtor's intent, such as (1) the lack of the obtainment of a formal appraisal prior to defendants' purchase of the subject property from StoneHunt, (2) defendants' ready agreement to StoneHunt's proposed sales price of the subject property without any material negotiation, (3) defendants' willingness to accommodate StoneHunt's desire for an expeditious transfer of the land's title in light of the prospect of a Court of Appeals decision reinstating plaintiff's claims against StoneHunt after StoneHunt's unequivocal e-mails to defendants' agents that the Court of Appeals "may have a decision fairly quickly" on plaintiff's appeal and therefore it was advisable "to try to get this [subject property sale] done as soon as possible[,]" (4) the fact that StoneHunt and defendants dissolved their joint venture to develop the subject property on the same day—2 February 2017—that defendants obtained title to the subject property from StoneHunt, (5) StoneHunt's favoritism of defendants to the detriment of plaintiff, and (6) StoneHunt's preference to sell the subject property to defendants outright rather than to contribute the land to their joint venture so that the subject property would not have been an ownership asset of StoneHunt that would be available to creditors such as plaintiff and to prevent plaintiff from collecting anything on a judgment, we determine that these non-statutory factors are consistent with the emblematic statutory factors found in N.C.G.S. § 39-23.4(b) to establish that the transfer of land by StoneHunt to defendants which was fraudulently performed is voidable as to plaintiff in plaintiff's capacity as StoneHunt's creditor, because as a debtor—and as expressly determined by the trial court—StoneHunt made the transfer with the intent to defraud plaintiff in plaintiff's role as StoneHunt's creditor. In recognizing the binding nature of these extensive and comprehensive findings of fact by the trial court upon this Court because they are either unchallenged on appeal or because they are supported by any competent evidence, the trial court erred as a matter of law in its failure to indicate its consideration of the imputation of knowledge of StoneHunt's fraudulent actions

to defendants in defendants' capacity as a co-principal of StoneHunt in their joint real estate development venture and the resulting common law recognition of their principal-agent relationship wherein defendants are charged with the knowledge of StoneHunt which was acquired by StoneHunt in the course of defendants' business pursuits with StoneHunt. The facts, as found by the trial court, compel the imputation of knowledge to defendants of StoneHunt's fraudulent activities as StoneHunt knew these activities to be fraudulent at the time of their commission, consequently rendering the transfer of the subject property to defendants by StoneHunt to be voidable as to plaintiff and thus denying defendants' ability, under these facts and circumstances, to be a good faith purchaser for value of the subject property.

D. Plaintiff's UDTPA Argument

¶ 32 As a related issue, plaintiff argues that if the trial court is deemed to have erred, as we have concluded was the case here, in determining defendants' status as good faith purchasers for value, then the trial court must also be instructed on remand to enter judgment in favor of plaintiff as to its UDTPA claim against Midtown Area Partners II, LLC, because the trial court's dismissal of this claim was predicated on its erroneous good faith purchaser determination. Plaintiff offers the bare assertion, without citation to controlling statutory or case law, that defendants' violation of the UVTA alone "constitutes a violation of the UDTPA as a matter of law." Plaintiff invokes several cases from this Court and the Court of Appeals which have tended to hold that violations of other fraud-related statutes also constitute violations of the UDTPA. *See*, *e.g.*, *Stanley v. Martin*, 339 N.C. 717, 723–25 (1995); *Winston Realty Co. v. G.H.G., Inc.*, 314 N.C. 90, 97–99 (1985).

¶ 33 Plaintiff's argument regarding this issue was not argued before, nor considered by, the Court of Appeals, and there is no decision from the lower appellate forum concerning the trial court's dismissal of plaintiff's UDTPA claim which was lodged against defendant Midtown Area Partners II, LLC when plaintiff amended its complaint against that party as a matter of right.[6] The argument was not referenced in plaintiff's petition for discretionary review, and thus was not considered in this Court's

6. The Court of Appeals did, however, hold that the trial court did not abuse its discretion in denying plaintiff's motion to amend its complaint against defendant Midtown Area Partners Holdings, LLC because that issue was properly briefed and argued before the Court of Appeals. Plaintiff expressly waived any argument concerning this issue on discretionary review before this Court, and the Court of Appeals opinion on the issue of the trial court's denial of plaintiff's motion to amend is therefore left undisturbed by this opinion.

allowance of plaintiff's request for this Court to afford discretionary review of the Court of Appeals decision. Rule 16(a) of the North Carolina Rules of Appellate Procedure states that, when reviewing a decision of the Court of Appeals "whether by appeal of right or by discretionary review," our task is limited to determining "whether there is error of law *in the decision of the Court of Appeals*." N.C. R. App. P. 16(a) (emphasis added). Unless a party asserts the right to appeal by virtue of the presence of a dissenting opinion within the Court of Appeals' decision in a case, our review "is limited to consideration of the issues stated in . . . the petition for discretionary review and the response thereto . . . and properly presented in the new briefs." *Id.* We have held that "[i]n the absence of error so fundamental that we would invoke our Rule 2 [of the North Carolina Rules of Appellate Procedure] power to suspend the rules and consider defendant's assignment of error, we, too, are bound by the Rules of Appellate Procedure, and will not review matters not properly before us." *State v. Fennell*, 307 N.C. 258, 263 (1982). We hold that whether defendants' violation of the UVTA constitutes a per se violation of the UDTPA is not an issue that is properly before the Court, and plaintiff asserts no argument which requests our invocation of Rule 2. Furthermore, we decline to invoke the general supervisory powers of the Court in order to implement such a definitive determination as urged by plaintiff. We therefore do not address the merits of plaintiff's argument concerning this issue.

III. Conclusion

¶ 34 In light of the foregoing observations, the decision reached by the Court of Appeals in this case is reversed in part and remanded to the Court of Appeals for further remand to the trial court for additional proceedings not inconsistent with this Court's opinion.

REVERSED IN PART AND REMANDED.

Justice BERGER did not participate in the consideration or decision of this case.

Justice BARRINGER concurring in part and dissenting in part.

¶ 35 This matter concerns a claim of invalid transfer of real property (Subject Property) between StoneHunt, LLC and Midtown Area Partners Holdings, LLC and Midtown Area Partners II, LLC (collectively MAP), alleged by The Cherry Community Organization (CCO). The Court of Appeals correctly held that the trial court's determination that MAP was

a good faith purchaser of the Subject Property was a finding of fact that was supported by competent evidence. Therefore, this Court should affirm the decision of the Court of Appeals.

¶ 36 In reaching a contrary conclusion, the majority fails to consider the unique nature of the asset in dispute—real property—and neglects to contemplate the effect at the time of purchase of the trial court's previous cancellation of CCO's notice of lis pendens. A full consideration of the evidence before the trial court—including the trial court's consistent denial of CCO's claims to the title of the Subject Property, MAP's independent efforts to ensure that the Subject Property's title was unencumbered, and the fact that MAP paid a reasonably equivalent value for the Subject Property—dictates that this Court should affirm the decision of the Court of Appeals that upheld the trial court's judgment. Therefore, I respectfully dissent in part. I concur with the majority's holding that CCO's argument concerning its claim against MAP under the Unfair or Deceptive Trade Practices Act is not properly before us and the majority's decision to decline to invoke the Court's general supervisory powers to reach the merits on this issue.

I. Background

¶ 37 In 2004, StoneHunt and CCO entered into a contract under which StoneHunt would purchase real property from CCO and provide some affordable housing on the real property conveyed. Thereafter, in 2005, StoneHunt purchased the real property, which included part of the Subject Property, from CCO. StoneHunt constructed a multi-story residential structure on one of the parcels purchased from CCO. In 2013, MAP approached StoneHunt to purchase the Subject Property, with the intention to add the land to a mixed-use development project. MAP and StoneHunt subsequently agreed to enter into a venture in which they would jointly pursue rezoning the Subject Property and another parcel owned by MAP. Accordingly, MAP and StoneHunt executed a zoning application in August 2014 for a mixed-use development covering the Subject Property. StoneHunt had already sold the remaining undeveloped real property purchased from CCO, except for the Subject Property, to another company. At the public hearing in April 2015 before the Charlotte City Council, two individuals spoke on behalf of CCO to voice their objections to the rezoning application. Ultimately, the rezoning was approved on 28 September 2015.

¶ 38 On 10 September 2015, CCO filed a complaint against StoneHunt alleging breach of contract and violation of the Unfair or Deceptive Trade Practices Act (UDTPA) and seeking money damages, partial rescission

of the contract and deed, and reconveyance of the Subject Property to CCO (Case No. 1). CCO also filed a notice of lis pendens with respect to the Subject Property.

¶ 39 On 26 May 2016, the trial court cancelled the notice of lis pendens after determining that pursuant to N.C.G.S. § 1-116(a)(1), CCO's allegations in the complaint for Case No. 1 did not affect title to the Subject Property (Cancellation Order). CCO appealed the Cancellation Order. While initially, the Court of Appeals temporarily stayed the Cancellation Order, the Court of Appeals later dissolved the stay on 16 June 2016. On 17 June 2016, CCO's counsel sent a letter to MAP's counsel informing MAP that although the notice of lis pendens had been cancelled by the trial court, CCO expected its claim to recover title to the Subject Property would be reinstated. Yet, on 4 April 2017, the Court of Appeals dismissed the appeal from the Cancellation Order, finding that the appeal was interlocutory and that CCO had not argued that the appeal affected a substantial right. *Cherry Cmty. Org. v. StoneHunt, LLC*, No. COA16-905, 2017 WL 1276077, at *3–4 (N.C. Ct. App. April 4, 2017).

¶ 40 MAP purchased the Subject Property from StoneHunt on 2 February 2017. Before the purchase, MAP had confirmed that the trial court had ruled that CCO's Case No. 1 had not affected the title to the Subject Property, that the trial court had cancelled the notice of lis pendens, and that there was currently no lis pendens filed with respect to the Subject Property. MAP paid StoneHunt $200,000 in cash and executed a promissory note in the amount of $900,000 due and payable on 2 February 2018.

¶ 41 On 30 August 2017, CCO filed a complaint against StoneHunt and MAP, asserting claims under the North Carolina Uniform Voidable Transactions Act (UVTA) pursuant to N.C.G.S. § 39-23.5, alleging that StoneHunt had engaged in a fraudulent transfer and that MAP was not a good faith purchaser and did not pay a reasonably equivalent value for the Subject Property (Case No. 2). CCO further moved for a preliminary injunction either enjoining MAP from paying $900,000 to StoneHunt on 2 February 2018 or enjoining StoneHunt and its principal from disposing of any payments related to the transfer of the Subject Property or other assets, or both. CCO also filed a notice of lis pendens relating to Case No. 2. On 9 February 2018, the trial court denied plaintiff's motion for a preliminary injunction.

¶ 42 In Case No. 1, the jury returned a verdict in July 2018 in favor of CCO, finding that StoneHunt breached the 2004 contract and finding facts supporting CCO's UDTPA claim. StoneHunt subsequently filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code,

and CCO and StoneHunt consented to a judgment in the amounts of $4,934,247, $591,929, $25,000, and $1,488,682, which respectively reflect the trebling of actual damages found by the jury, interest, costs, and attorneys' fees.

¶ 43 Beginning 18 July 2018, a bench trial was conducted on Case No. 2 by the same judge who had presided over Case No. 1 since 2017. On 31 December 2018, the trial court entered a judgment in Case No. 2. The trial court found that CCO had met its burden of proof to show that StoneHunt intended to hinder, delay, or defraud CCO when it conveyed the Subject Property to MAP. *See* N.C.G.S. § 39-23.4(a)(1) (2021) ("A transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation . . .[w]ith intent to hinder, delay, or defraud any creditor of the debtor . . . ."). However, the trial court found that MAP met its burden of proof to show that it was a good faith purchaser of the Subject Property and paid a reasonably equivalent value for the property. The trial court noted that "[m]ere knowledge of a claim by a creditor that does not affect title does not preclude MAP from being a good faith purchaser." As a result, the trial court found that the transfer of the Subject Property was not voidable pursuant to N.C.G.S. § 39-23.8(a). *See* N.C.G.S. § 39-23.8(a) (2021) ("A transfer or obligation is not voidable under [N.C.]G.S. [§] 39-23.4(a)(1) against a person that took in good faith and for a reasonably equivalent value given the debtor or against any subsequent transferee or obligee."). Therefore, the trial court adjudged that CCO should recover nothing against MAP, dismissed CCO's claim against MAP with prejudice, and decreed the notice of lis pendens void.

¶ 44 Plaintiff appealed. On appeal, CCO argued that the trial court erred when it concluded MAP was a good faith purchaser of the Subject Property. The Court of Appeals disagreed and affirmed the trial court's judgment in Case No. 2.

¶ 45 After appealing Case No. 2, CCO also filed an appeal from the Cancellation Order entered in Case No. 1. However, CCO withdrew its appeal from the Cancellation Order on 28 January 2020.

II. Standard of Review

¶ 46 In a bench trial in which the trial court sits without a jury, the standard of review is whether competent evidence supported the trial court's findings of fact and whether those findings support its conclusions of law. *Lumbee River Elec. Membership Corp. v. City of Fayetteville*, 309 N.C. 726, 741–42 (1983). In reviewing the trial court's findings of fact,

"[t]he findings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary." *Id.* at 741. A trial court's judgment "must be granted the same deference as a jury verdict." *Id.*

III. Analysis

¶ 47 Under the UVTA, "[a] transfer [of property] is not voidable under [N.C.]G.S. [§] 39-23.4(a)(1) against a person that took in good faith and for a reasonably equivalent value." N.C.G.S. § 39-23.8(a). The transferee has the burden of proving that it took the property in good faith and that it paid reasonably equivalent value for the property by a preponderance of the evidence. N.C.G.S. § 39-23.8(g)(1), (h).

¶ 48 As previously noted, the trial court determined that "MAP ha[d] established and met its burden of proof to show that it was a good faith purchaser of the Subject Property and that it paid reasonably equivalent value for the Subject Property." Since "[w]hether a party has acted in good faith is a question of fact for the trier of fact," *Bledsole v. Johnson*, 357 N.C. 133, 138 (2003), the Court of Appeals properly treated this determination as a finding of fact. *Cherry Cmty. Org. v. Sellars*, No. COA19-695, 2020 WL 774020, at *4 (N.C. Ct. App. Feb. 18, 2020) (unpublished opinion); *see also Embree Constr. Grp., Inc. v. Rafcor, Inc.*, 330 N.C. 487, 499 (1992) ("The question of 'good faith' is one of fact to be resolved by the jury . . . ."). Therefore, this Court's task is to determine whether the finding of MAP's good faith is supported by competent evidence.

¶ 49 While good faith is not defined in N.C.G.S. § 39-23.8, this Court has recognized in other contexts that good faith "is an equitable concept premised on honest belief and fair dealing with another." *Bledsole*, 357 N.C. at 140. Determining a party's good faith requires consideration of "the circumstances and context in which the party acted." *Id.* at 138.

¶ 50 Regarding the circumstances and context of this case, it is noteworthy that it involves a real property transaction. In real property transactions, our law has consistently recognized that "a sale or mortgage for a valuable consideration may be upheld as valid, though the seller or mortgagor intended by the transaction to delay or defraud his creditors, where it is not shown that the purchaser or mortgagee participated in the fraudulent purpose." *Henry W. Wolfe & Co. v. Arthur*, 118 N.C. 890, 899 (1896).[1] Nonetheless, a showing of actual knowledge and

1. Wolfe is spelled "Wolfe" in the text of the North Carolina Reports but is listed as "*Wolf*" on Westlaw and in the "Cases Reported" portion of Volume 118 of the North Carolina

involvement is not required when the transferee had "notice of such facts as would induce any prudent man to institute and prosecute inquiries that *would have led to the discovery by them of the covinous purpose* of [the transferor]." *Id.* at 898–99 (emphasis added).

¶ 51 Further, because this is a real estate transaction, the doctrine of lis pendens applies. Under "[t]he firmly-established doctrine of lis pendens[,] . . . '[w]hen a person buys property pending an action of which he has notice, actual or presumed, *in which the title to it is in issue*, from one of the parties to the action, he is bound by the judgment in the action, just as the party from whom he bought would have been.' " *Hill v. Pinelawn Mem'l Park, Inc.*, 304 N.C. 159, 163–64 (1981) (original emphasis omitted and emphasis added) (quoting *Rollins v. Henry*, 78 N.C. 342, 351 (1878)). Likewise, "[t]he lis pendens statutes enable a purchaser for a valuable consideration who has no actual notice of the pendency of litigation affecting the title to the land to proceed with assurance when the lis pendens docket does not disclose a cross-indexed notice disclosing the pendency of such an action." *Lawing v. Jaynes*, 285 N.C. 418, 432 (1974) (original emphasis omitted); *see also Lis Pendens*, Black's Law Dictionary (11th ed. 2019) (stating the purpose of a notice of lis pendens as "to warn all persons that certain property is the subject matter of litigation, and that any interests acquired during the pendency of the suit are subject to its outcome"). Thus, a lis pendens provides "record notice[ ] upon the absence of which a prospective innocent purchaser may rely." *Whitehurst v. Abbott*, 225 N.C. 1, 5 (1945).

¶ 52 In this matter, the trial court found that prior to purchase, MAP had confirmed that the trial court had ruled that CCO's Case No. 1 had not affected the title of the Subject Property and had cancelled the lis pendens, that there was currently no lis pendens, that MAP's attorneys conducted a title search, and that MAP obtained a commitment from a title insurance company to insure the Subject Property's title as free and clear without any exception for any notice of lis pendens. MAP had also sought to purchase the property since 2013, long before any litigation by CCO. These facts are not in dispute, and on this basis, MAP argues it could not have acted in bad faith. These findings, which are supported by competent evidence, do support the finding of good faith. While the letter sent to MAP by CCO's attorney gave MAP actual notice of CCO's pending contract action against StoneHunt, the notice of lis pendens had already been cancelled by the trial court, indicating CCO had *no valid*

Reports. The page numbers in the Supreme Court reporter are misnumbered. The page numbering skips from 891 directly to 898.

claim to the Subject Property's title. Further, the property had been recently re-zoned by the Charlotte City Council. Had there been a cloud on the title, the rezoning would not have occurred. As found by the trial court, "[m]ere knowledge of a claim by a creditor that does not affect title does not preclude MAP from being a good faith purchaser." *See Hill*, 304 N.C. at 165 ("While actual notice of another unrecorded conveyance does not preclude the status of innocent purchaser for value, actual notice of pending litigation *affecting title to the property* does preclude such status." (emphasis added)).

¶ 53 Moreover, no reinstatement of the lis pendens ever occurred. The Court of Appeals dissolved the temporary stay of the Cancellation Order. CCO's subsequent appeal to the Court of Appeals with respect to the Cancellation Order was then dismissed as interlocutory, because CCO failed to "address in its brief any substantial right which would be jeopardized." *StoneHunt*, 2017 WL 1276077, at *3 (cleaned up). After entry of final judgment in Case No. 1, CCO appealed the trial court's Cancellation Order again. However, CCO moved to withdraw this appeal on 17 January 2020, and the Court of Appeals allowed the withdrawal on 28 January 2020. Thus, CCO abandoned its right to contend that Case No. 1 affected the Subject Property's title.

¶ 54 Further, MAP's payment of more than a reasonably equivalent value for the Subject Property is additional competent evidence of MAP's good faith. After hearing testimony and considering appraisals by multiple witnesses, the trial court accepted the estimated value of the Subject Property as approximately $664,000. MAP, however, paid $1,100,000 for the Subject Property.

¶ 55 Therefore, the evidence put forth at trial was competent to support the trial court's finding that MAP was a good faith purchaser. Most notably: MAP was on notice that CCO had no valid claims to the title of the Subject Property since the notice of lis pendens was cancelled, and that remains the law of this case. Furthermore, MAP conducted an independent investigation to ensure that the Subject Property's title was unencumbered, and MAP paid more than a reasonably equivalent value for the Subject Property. While ultimately CCO was left without a solvent entity from which to collect its judgment against StoneHunt in Case No. 1, subsection 39-23.8(a) provides MAP a complete defense to avoidance of StoneHunt's fraudulent transfer and such defense is assessed at the time of transfer. N.C.G.S. § 39-23.8, official cmt. (2014). Both precedent and the statutory enactments of our legislature compel that we leave this determination to the fact-finder. Accordingly, we should adhere today to our role as an appellate court and decline to usurp the

authority of the trial court by reweighing the evidence in this matter, even if our sympathies would encourage us to do otherwise. We should also recognize that to do otherwise would render real property purchasers subject to the will of an appellate court to determine issues better suited for a fact-finder and would undermine the certainty and predictability necessary to protect good faith purchasers of real property, lenders, and insurers of real property title.

Chief Justice NEWBY joins in this concurring in part and dissenting in part opinion.

HOKE COUNTY BOARD OF EDUCATION, ET AL., PLAINTIFFS	)	
AND	)	
CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, PLAINTIFF-INTERVENOR	)	
AND	)	
RAFAEL PENN, ET AL., PLAINTIFF-INTERVENORS	)	
v.	)	Wake County
STATE OF NORTH CAROLINA AND THE STATE BOARD OF EDUCATION	)	
AND	)	
CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, REALIGNED DEFENDANT	)	
AND	)	
PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT *PRO TEMPORE* OF THE NORTH CAROLINA SENATE, AND TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, INTERVENOR-DEFENDANTS	)	

No. 425A21-1

ORDER

Plaintiffs' Notice of Appeal Based Upon a Dissent, Plaintiffs' Notice of Appeal Based Upon a Constitutional Question, Plaintiffs' Petition for Discretionary Review Under N.C.G.S. § 7A-31, Plaintiffs' Petition in the Alternative for Writ of Certiorari to Review Order of N.C. Court of Appeals, Plaintiff-Intervenors' (Rafael Penn, et al.) Notice of Appeal Based Upon a Dissent, Plaintiff-Intervenors' (Rafael Penn, et al.) Notice of Appeal Based Upon a Constitutional Question, Plaintiff-Intervenors' (Rafael Penn, et al.) Petition for Discretionary Review Under N.C.G.S. § 7A-31, Plaintiff-Intervenors' (Rafael Penn, et al.) Petition for Writ of Certiorari to Review Order of N.C. Court of Appeals, Controller's Motion to Dismiss Appeals, Controller's Conditional Petition for Writ of Supersedeas, and Legislative-Intervenors' Motion to Dismiss Appeals

are held in abeyance, with no other action, including the filing of briefs, to be taken until further order of the Court.

By order of the Court in conference, this the 18th day of March 2022.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 21st day of March 2022.

GRANT E. BUCKNER
Clerk, Supreme Court of
North Carolina

s/Grant E. Buckner

~~M.C. Hackney~~
~~Assistant~~ Clerk, Supreme Court of
North Carolina

HOKE COUNTY BOARD OF EDUCATION, ET AL., PLAINTIFFS	)	
AND	)	
CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, PLAINTIFF-INTERVENOR	)	
AND	)	
RAFAEL PENN, ET AL., PLAINTIFF-INTERVENORS	)	
v.	)	Wake County
STATE OF NORTH CAROLINA AND THE STATE BOARD OF EDUCATION, DEFENDANT	)	
AND	)	
CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, REALIGNED DEFENDANT	)	
AND	)	
PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT *PRO TEMPORE* OF THE NORTH CAROLINA SENATE, AND TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, INTERVENOR-DEFENDANTS	)	

No. 425A21-2

ORDER

Defendant State of North Carolina's Petition for Discretionary Review Prior to Determination by the Court of Appeals and Plaintiff's Petition for Discretionary Review Prior to Determination by the Court of Appeals are allowed. Defendant State of North Carolina's Motion to Set an Expedited Schedule is determined as followed: This case is remanded to Superior Court, Wake County, for a period of no more than thirty days for the purpose of allowing the trial court to determine what effect, if any, the enactment of the State Budget has upon the nature and extent of the relief that the trial court granted in its 11 November 2021 order. The trial court is instructed to make any necessary findings of fact and conclusions of law and to certify any amended order that it chooses to enter with this Court on or before the thirtieth day following the entry

of this order. As soon as the trial court has certified to this Court any amended order that it chooses to enter, this Court will enter any such other and further orders governing the procedures to be followed in this case as it deems necessary. In the meantime, the otherwise-applicable schedule for filing briefs in this case is held in abeyance pending further order of the Court.

By order of the Court in conference, this the 18th day of March 2022.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 21st day of March 2022.

GRANT E. BUCKNER
Clerk, Supreme Court of
North Carolina

s/Grant E. Buckner

~~M.C. Hackney~~
~~Assistant~~ Clerk, Supreme Court of
North Carolina

MICHAEL MOLE´	)	
	)	
v.	)	Durham County
	)	
CITY OF DURHAM, A MUNICIPALITY	)	

No. 394PA21

ORDER

Defendant-Appellee's Motion to Designate Parties and Plaintiff Appellant's Motion to Extend Time to File His Brief are decided as follows: The Court's allowance of plaintiff's petition for discretionary review also encompasses, in this case, the allowance of the issue identified in defendant's response to plaintiff's petition for discretionary review. In addition, Defendant-Appellee's Motion to Designate Parties and Plaintiff Appellant's Motion to Extend Time to File his Brief are allowed, with Plaintiff being classified as the appellant, defendant being classified as the appellee, and plaintiff's appellant's brief being due on or before 10 May 2022.

By order of the Court in conference, this the 29th day of March 2022.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 29th day of March 2022.

GRANT E. BUCKNER
Clerk, Supreme Court of
North Carolina

s/Grant E. Buckner

~~M.C. Hackney~~
~~Assistant~~ Clerk, Supreme Court of
North Carolina

STATE v. McNEILL

[381 N.C. 269 (2022)]

STATE OF NORTH CAROLINA	)	From Cumberland
	)	09CRS65760 09CRS66040
v.	)	09CRS66041
	)	
MARIO ANDRETTE McNEILL	)	

No. 446A13-2

ORDER

Defendant's Petition for Writ of Certiorari to Review Order of Superior Court, Cumberland County is dismissed without prejudice to defendant's right to later raise any potential issues encompassed therein.

By order of the Court in Conference, this the 4th day of May 2022.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6th day of May 2022.

s/Grant E. Buckner
Grant E. Buckner
Clerk of the Supreme Court

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

6 MAY 2022

8P22	State of North Carolina v. Carlos DeMarcuis Burch	Def's PDR Under N.C.G.S. § 7A-31 (COA20-753)	Denied
10P22	Kevin Nesbeth v. Shannon Flynn	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA20-404) 2. Plt's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
12P22-2	State v. Rose Williams	Def's Pro Se Motion for Clarification of Motion Being Dismissed	Dismissed
16P22	Lawyers Andrew Locke Clifford and Daniel Allen Harris, Third Parties Applicable from Guilford County v. Iman Fadulalla Khidr	Def's Pro Se Motion for PDR	Dismissed
20PA19-2	State v. Utaris Mandrell Reid	Def's Motion to Direct that the Mandate Issue Immediately	Allowed **03/15/2022** **Berger, J., recused**
22P22	Carrie C. Taylor v. Carolyn Trice Walker, Harold Trice, Carl Trice	1. Petitioner's Pro Se Motion for Notice of Petition for Writ of Certiorari (COAP21-563) 2. Petitioner's Pro Se Petition for Writ of Certiorari to Review Order of the COA	1. Denied 2. Denied
23P22	State v. Eric Pierre Stewart	1. State's Motion for Temporary Stay (COA21-101) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/21/2022** 2. Allowed 3. Allowed
28P22	State v. Michael Isaac Russ	Def's PDR Under N.C.G.S. § 7A-31 (COA20-742)	Denied
31P22	American Southwest Mortgage Corp. and American Southwest Mortgage Funding Corp. v. Terrance J. Arnold; Nancy E. Arnold; First Mortgage Company, LLC, d/b/a Cunningham & Company; and JP Morgan Chase Bank, N.A.	Plts' PDR Under N.C.G.S. § 7A-31 (COA21-315)	Denied

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

6 MAY 2022

32P22	American Southwest Mortgage Corp. and American Southwest Mortgage Funding Corp. v. Mary Ellen O'Meara; First Mortgage Company, LLC; and Wells Fargo Bank, N.A.	Plts' PDR Under N.C.G.S. § 7A-31 (COA21-311)	Denied
35PA21	In the Matter of A.J.L.H., C.A.L.W., M.J.L.H.	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA20-267) 2. Petitioner's Motion for Temporary Stay 3. Petitioner's Petition for Writ of Supersedeas 4. Respondent-Father's Emergency Motion to Dissolve the Temporary Stay 5. Respondent-Father's Motion for Sanctions 6. Respondent-Mother's Motion for Sanctions 7. Guardian ad Litem's Motion to Withdraw and Substitute Counsel 8. Respondent-Father's Motion to Dissolve the Temporary Stay	1. Allowed **04/08/2022** 2. Allowed **01/21/2021** 3. Allowed **04/08/2022** 4. Denied **02/01/2021** 5. Denied **03/09/2022** 6. Denied **03/09/2022** 7. Allowed **02/17/2021** 8. Denied **02/17/2021**
38P22	State v. William Joseph Barber	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA20-268) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
39A22	State v. Robin Applewhite	1. Def's Notice of Appeal Based Upon a Dissent (COA20-610) 2. Def's PDR as to Additional Issues 3. State's Motion for Permission to Deliver Original Sealed Exhibit	1. --- 2. Allowed 3. Allowed **02/11/2022**
41A22	State v. Mark Brichikov	1. State's Motion for Temporary Stay (COA20-660) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **02/04/2022** 2. Allowed 3. ---
45PA18-2	State v. Pierre Alexander Amerson	Def's PDR Under N.C.G.S. § 7A-31 (COA20-836)	Denied

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

6 MAY 2022

47P22	In the Matter of Precious McNeil	Plt's Pro Se Motion for Examination	Dismissed
51P21	State v. William P. Sherrill	Def's Pro Se Motion for a Bond	Dismissed **04/08/2022**
62P22	Thomasina Gean v. National General Insurance Company/Integon Insurance	Plt's Pro Se Motion to Review the Case	Dismissed
63P22	Travis Baxter v. Hames Wojcik	1. Plt's Pro Se Motion for Notice of Appeal of Right Constitutional Question 2. Plt's Pro Se Motion for Stay of Judgment 3. Plt's Pro Se Motion for Stay of Proceedings	1. Dismissed *ex mero motu* 2. Dismissed 3. Dismissed
66P22	State v. Noah Junior Toler	Def's Pro Se Motion to Get Back into Advanced Supervised Release Program	Dismissed
69A22	Miller v. LG Chem Ltd., et al.	1. Plt's Motion to Admit Deepak Gupta Pro Hac Vice 2. Plt's Amended Motion to Admit Deepak Gupta Pro Hac Vice 3. Plt's Motion to Admit Robert D. Friedman Pro Hac Vice 4. Defs' (LG Chem, Ltd. and LG Chem America, Inc.) Motion to Admit Wendy S. Dowse Pro Hac Vice	1. Denied **03/28/2022** 2. Allowed **03/29/2022** 3. Allowed **04/28/2022** 4. Allowed **04/28/2022**
70P22	Edward L. Cobbler and Patricia D. Lowe v. Anthony Q. Knotts	Def's Pro Se Motion for First Appearance and to Set Bond	Denied **03/15/2022**
71P21	Angela Annette Palmer v. Elaine Brown, et al.	1. Plt's (Angela Annette Palmer) Motion for Appeal 2. Def's (Lawrence Larabee Jr., M.D.) Motion to Dismiss Appeal 3. Def's (Dee Dee Morris) Motion to Dismiss Appeal 4. Defs' (Elaine McNeil Brown, Nicole Patrick, and John Costello) Motion to Dismiss Plaintiff's Appeal	1. Dismissed **04/08/2022** 2. Allowed **04/08/2022** 3. Allowed **04/08/2022** 4. Allowed **04/08/2022**
77P22	In re Anthony Aikens	Petitioner's Pro Se Petition for Writ of Habeas Corpus	Denied **03/10/2022**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

6 MAY 2022

78P22	State v. Eric Antron Ingram	Def's Pro Se Motion for Assistance in Review of Case	Dismissed **03/16/2022**
79P22	State v. Clarence Melvin Battle	1. Def's Pro Se Petition for Writ of Mandamus 2. Def's Pro Se Petition for Writ of Habeas Corpus	1. Denied **03/17/2022** 2. Denied **03/17/2022**
80P22	State v. Bobby Thomas Liles, Jr.	Def's Pro Se Motion for Review	Dismissed **04/01/2022**
83P22	State v. Joseph Adams Hales, III	1. Def's Pro Se Motion for Temporary Stay (COA21-121) 2. Def's Pro Se Petition for Writ of Supersedeas 3. Def's Pro Se Notice of Appeal Based Upon a Constitutional Question	1. Denied **03/22/2022** 2. Denied **03/22/2022** 3. Dismissed *ex mero motu* **03/22/2022**
88P22	Johnathan Glenn Henry v. State of North Carolina	Petitioner's Pro Se Motion for Violation of Policy	Dismissed **03/30/2022**
89P22	Eric Steven Fearrington, Craig D. Malmrose v. City of Greenville, Pitt County Board of Education	1. Defs' Motion for Temporary Stay (COA20-877) 2. Defs' Petition for Writ of Supersedeas	1. Allowed **03/30/2022** 2.
93P22	State v. Ryan Keith Moore	Def's PDR Under N.C.G.S. § 7A-31 (COA20-733)	Denied
97A20-2	State v. Antiwuan Tyrez Campbell	1. Def's Notice of Appeal Based Upon a Dissent (COA18-998-2) 2. Petition for Discretionary Review as to Additional Issues 3. Def's Motion for Extension of Time to File Brief 4. Def's Motion for Extension of Time to File Brief 5. Def's Motion for Extension of Time to File Brief 6. Def's Motion for Extension of Time to File Brief 7. Roderick and Solange MacArthur Justice Center and American Civil Liberties Union's Motion for Leave to File Amicus Brief	1. — 2. Allowed **12/15/2020** 3. Allowed **01/14/2021** 4. Allowed **02/16/2021** 5. Allowed **04/13/2021** 6. Allowed **05/03/2021** 7. Allowed **06/18/2021**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

6 MAY 2022

		8. Roderick and Solange MacArthur Justice Center and American Civil Liberties Union's Motion to Admit Easha Anand Pro Hac Vice	8. Dismissed as moot **05/02/2022**
		9. Roderick and Solange MacArthur Justice Center and American Civil Liberties Union's Motion to Admit Elizabeth R. Cruikshank Pro Hac Vice	9. Dismissed as moot **05/02/2022**
		10. Roderick and Solange MacArthur Justice Center and American Civil Liberties Union's Motion to Admit Daniel A. Rubens Pro Hac Vice	10. Dismissed as moot **05/02/2022**
		11. Roderick and Solange MacArthur Justice Center and American Civil Liberties Union's Motion to Admit Sarah H. Sloan Pro Hac Vice	11. Dismissed as moot **05/02/2022**
		12. Black Lives Matter Activists' (Zachary Boyce, Kerwin Pittman, Kristie Puckett-Williams, and Ronda Taylor Bullock) Motion for Leave to File Amicus Brief	12. Allowed **06/18/2021**
		13. Black Lives Matter Activists' (Zachary Boyce, Kerwin Pittman, Kristie Puckett-Williams, and Ronda Taylor Bullock) Motion to Admit Tiffany R. Wright Pro Hac Vice	13. Allowed **05/02/2022**
		14. Roderick and Solange MacArthur Justice Center and American Civil Liberties Union's Amended Motion to Admit Easha Anand Pro Hac Vice	14. Allowed **05/02/2022**
		15. Roderick and Solange MacArthur Justice Center and American Civil Liberties Union's Amended Motion to Admit Elizabeth R. Cruikshank Pro Hac Vice	15. Allowed **05/02/2022**
		16. Roderick and Solange MacArthur Justice Center and American Civil Liberties Union's Amended Motion to Admit Daniel A. Rubens Pro Hac Vice	16. Allowed **05/02/2022**
		17. Roderick and Solange MacArthur Justice Center and American Civil Liberties Union's Amended Motion to Admit Sarah H. Sloan Pro Hac Vice	17. Allowed **05/02/2022**
101P22	Solomon Nimrod Butler v. Claire V. Hill	Petitioner's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP21-481)	Denied

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

6 MAY 2022

102P19-2	State v. Christopher Lee Neal	1. Def's Pro Se Motion to Dismiss Indictment for Lack of Subject Matter Jurisdiction (COAP17-537) 2. Def's Pro Se Motion for Notice of Appeal 3. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Alamance County	1. Dismissed 2. Dismissed 3. Dismissed
102A20-2	Taylor, et al. v. Bank of America, N.A.	Plts' Motion to Admit Justin Witkin, Daniel Thornburgh, Chelsie Warner, and Caitlyn Miller Pro Hac Vice	Denied **03/28/2022** **Berger, J., recused**
102P22	State v. Marcus A. Satterfield	1. Def's Pro Se Petition for Writ of Habeas Corpus 2. Def's Pro Se Motion for Dismissal	1. Denied **04/08/2022** 2. Dismissed **04/08/2022**
104P22	State v. Travis Wayne Baxter	1. Def's Pro Se Motion for Petition and Order of Expunction 2. Def's Pro Se Motion to Certify Defendant as Attorney in the State of North Carolina	1. Dismissed 2. Dismissed
106P22	G. Marshall Johnson v. North Carolina Bar	Plt's Pro Se Motion for Complaint Against North Carolina Bar	Dismissed **04/27/2022**
110P22	State v. Oscar Martin Cook, III	1. Def's Pro Se Motion for Copies of Documents 2. Def's Pro Se Motion for Preparation of Stenographic Transcript	1. Dismissed 2. Dismissed
112P22	State v. Grant P. Dalton	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **04/14/2022**
114P22	Stephens v. Stephens	Petitioner's Pro Se Motion to Review the Case	Dismissed **04/19/2022**
115P22	State v. Eduardo Vidal Mercado	Def's Pro Se Petition for Writ of Mandamus	Denied **04/19/2022**
116P22	State v. Sherman Gerrard Holley	1. Def's Pro Se Motion to Remove Counsel 2. Def's Pro Se Motion for Speedy Trial	1. Dismissed **04/18/2022** 2. Dismissed **04/18/2022**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

6 MAY 2022

118P22	Timothy Shane Hoffman v. Marissa Curry	1. Def's Pro Se Motion for Temporary Stay 2. Def's Pro Se Petition for Writ of Supersedeas	1. Denied **04/19/2022** 2.
119P22	State v. Tiran C. Farris	Def's Pro Se Motion for Speedy Trial or Speedy Disposition of Warrants, Information, Detainers, Indictments	Dismissed **04/20/2022**
123P22	The Society for the Historical Preservation of the Twenty-Sixth North Carolina Troops, Inc. v. City of Asheville, North Carolina and Buncombe County, North Carolina	1. Plt's Motion for Temporary Stay (COA21-429) 2. Plt's Petition for Writ of Supersedeas 3. Plt's Petition for Discretionary Review Under N.C.G.S. § 7A-31	1. Allowed **04/22/2022** 2. 3.
124P22	State v. Richard Henry Jordan, Jr.	1. State's Motion for Temporary Stay (COA21-91) 2. State's Petition for Writ of Supersedeas 3. State's Petition for Discretionary Review Under N.C.G.S. § 7A-31	1. Allowed **04/21/2022** 2. 3.
125P22	State v. Jaime Suzanne Bowen	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas	1. Allowed **04/22/2022** 2.
128P22	Leilei Zhang v. Preston K. Sutton, III	1. Plt's Pro Se Expedited Petition for Writ of Certiorari to Review Order of the COA (COA22-79) 2. Plt's Pro Se Motion for Temporary Stay 3. Plt's Pro Se Motion for Writ of Supersedeas	1. Denied **04/26/2022** 2. Denied **04/29/2022** 3. Denied **04/29/2022**
130P22-1	State v. Travis Wayne Baxter	Def's Pro Se Motion to be Freed from Jail and Property Returned	Denied **04/28/2022**
130P22-2	Baxter v. Cooper, et al.	Plt's Pro Se Motion for Criminal Negligence, Aiding and Abetting, Burglary, Kidnapping, False Arrest, Unlawful Imprisonment, Cruel and Unusual Punishment, Trespass to Property, Trespass to Person, Insurance Law Contract Violation	Denied **05/03/2022**

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134P22	Kimarlo Ragland v. Francene Gregory	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of District Court, Vance County 2. Def's Pro Se Petition for Writ of Supersedeas 3. Def's Pro Se Motion for Relief	1. Dismissed **05/04/2022** 2. Dismissed **05/04/2022** 3. Dismissed **05/04/2022**
140P21	State v. John Shadrick Matthews, III	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Guilford County 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
143A95-8	State v. Charles Phillips Bond	1. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Bertie County 2. State's Motion for Extension of Time to File Response	1. Denied 2. Allowed **01/05/2022**
147A21	In the Matter of D.R.J.	Petitioner's Motion to Dispense with Oral Argument	Dismissed as moot
173P21-2	State v. Aaron L. Stephen	1. Def's Pro Se Motion to Waive Counsel 2. Def's Pro Se Motion for Speedy Trial 3. Def's Pro Se Motion for Dismissal	1. Dismissed **03/22/2022** 2. Dismissed **03/22/2022** 3. Dismissed **03/22/2022**
184P21	State v. Lee Jernard Burns	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA20-259) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
199P18-2	State v. Shenandoah Freeman	Def's Pro Se Motion for Notice of Appeal (COA17-347)	Dismissed
205P21	State v. Ronald Keith Ezzell	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA20-50) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed

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210P20-2	State v. Quamaine Lee Massey	1. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Anson County	1. Dismissed
		2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	2. Allowed
		3. Def's Pro Se Motion to Appoint Counsel	3. Dismissed as moot
		4. Def's Pro Se Motion to Give Time Back/Immediate Release on Parole	4. Dismissed
		5. Def's Pro Se Motion for Immediate Release on Parole	5. Dismissed
		6. Def's Pro Se Motion for Relief	6. Dismissed
		7. Def's Pro Se Motion for Early Parole	7. Dismissed
		8. Def's Pro Se Motion for Deportation Releases and Verification	8. Dismissed
		9. Def's Pro Se Motion for Immediate Release	9. Denied **04/19/2022**
216P10-2	State v. Markese Donnell Rice	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA21-154)	Denied
221A21	In the Matter of M.C.B.	1. Petitioner's Motion to Dismiss Appeal	1. Allowed
		2. Guardian ad Litem's Motion to Dismiss Appeal	2. Dismissed as moot
		3. Guardian ad Litem's PDR Prior to a Determination by the COA	3. Special Order **11/02/2021**
		4. Guardian ad Litem's Motion to Suspend the Appellate Rules to Permit Expedited Review	4. Special Order **11/02/2021**
		5. Guardian ad Litem's Motion to Consolidate Appeals	5. Special Order **11/02/2021**

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228A21	C Investments 2, LLC v. Arlene P. Auger, Herbert W. Auger, Eric E. Craig, Gina Craig, Laura Dupuy, Stephen Ezzo, Janice Huff Ezzo, Anne Carr Gilman Wood, as Trustee of the Francis Davidson Gilman, III Trust f/b/o Pets U/W Dated June 20, 2007, Lauren Heaney, Bridget Holdings, LLC, Ginner Hudson, Jack Hudson, Chad Julka, Sabrina Julka, Arthur Maki, Ruth Maki, Jennie Raubacher, Matthew Raubacher, as Co-Trustees of the Raubacher/Cheung Family Trust Dated November 11, 2018, Lawrence Tillman, Linda Tillman, Ashfaq Uraizee, Jabeen Uraizee, Jeffrey Stegall, and Valerie Stegall	1. Defs' (Jennie Raubacher, et al.) Motion in the Alternative to Consider Brief as Amicus Curiae Brief 2. Defs' (Jennie Raubacher, et al.) Petition for Writ of Certiorari to Review Decision of the COA 3. Defs' (Jennie Raubacher, et al.) Motion to Strike 4. Plt's Motion for Substitution of Parties	1. Denied 2. Denied 3. Dismissed as moot 4.
241P21	State v. Donald S. Edwards	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Alamance County	Dismissed
253P19-4	State v. Justin Michael Tyson	Def's Pro Se Motion for Relief from Judgment or Order	Dismissed
263P21	In re J.U.	1. State's Motion for Temporary Stay (COA20-812) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/10/2021** 2. Allowed 3. Allowed
272A14	State v. Jonathan Douglas Richardson	1. Def's Pro Se Motion to Preserve Def's Position 2. State's Motion to Dissolve Stay of Def's Direct Appeal 3. State's Motion to Hold All Other Pending Proceedings in Abeyance	1. 2. Allowed 3. Allowed

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276A21	State v. Michael Steven Elder	State's Motion to Continue Oral Argument (COA20-215)	Allowed **04/12/2022**
280P21-3	Travis Wayne Baxter v. Lincoln County Sheriff Office	Plt's Pro Se Motion for Rehearing and Hearing of Merits of Case (COA21-392)	Dismissed
290P21	State v. Claude Mordecia Stevens	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA20-421)	Denied
291P21	State v. Cherelle Renee Hills	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA20-9)	Denied
294PA17-2	State v. Nancy Benge Austin	Def's PDR Under N.C.G.S. § 7A-31 (COA20-198)	Denied
294A21	State v. Harold Eugene Swindell	1. State's Motion for Temporary Stay (COA20-263) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent 4. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/20/2021** 2. Allowed **09/08/2021** 3. --- 4. Denied
297P21	State v. William Matthew Fortney	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA20-524)	Denied
300P21	Charles F. Walter, Jr. v. Lawrence Joseph Walter, Sr.; Laurie Walter; Lawrence Joseph Walter, Jr.; Angel Walter; Thomas D. Walter, Individually and as Personal Representative of the Estate of Louise Walter; Judith Walter; The Louise M. Walter Trust u/t/d February 7, 2000 as Amended Through Thomas D. Walter, First Successor Trustee; Melanie Walter Day; Patrick Day; Edwin Boyer as Administrator ad Litem of the Estate of Charles Walter; Barbara Evers as Personal Representative of the Estate of Charles Walter	Plt's Petition for Writ of Certiorari to Review Decision of the COA (COA20-154)	Denied

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304P20-6	State v. Clyde Junior Meris	1. Def's Pro Se Emergency Petition for Writ of Certiorari to Review Order of Superior Court, Guilford County 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
324P20-2	State v. Joseph Levi Grantham	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Randolph County	Denied
331P21	Community Success Initiative, et al. v. Moore, et al.	1. Plts' PDR Prior to a Determination by COA (COAP22-153) 2. Plts' Motion to Suspend Appellate Rules 3. Plts' Motion for Leave to File Reply	1. Allowed 2. Dismissed as moot 3. Dismissed as moot
334A21	State v. Sindy Lina Abbitt ——————— State v. Daniel Albarran	1. Def's (Sindy Lina Abbitt) Notice of Appeal Based Upon a Dissent (COA20-309) 2. Def's (Sindy Lina Abbitt) PDR as to Additional Issues 3. Def's (Daniel Albarran) Notice of Appeal Based Upon a Dissent	1. --- 2. Denied 3. ---

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342PA19-2	Jabari Holmes, Fred Culp, Daniel E. Smith, Brendon Jaden Peay, and Paul Kearney, Sr. v. Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives; Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate; David R. Lewis, in his official capacity as Chairman of the House Select Committee on Elections for the 2018 Third Extra Session; Ralph E. Hise, in his official capacity as Chairman of the Senate Select Committee on Elections for the 2018 Third Extra Session; the State of North Carolina; and the North Carolina State Board of Elections	1. Defs' Motion to Admit David H. Thompson Pro Hac Vice (COA19-762 22-16) 2. Defs' Motion to Admit Peter A. Patterson Pro Hac Vice 3. Defs' Motion to Admit Joseph O. Masterman Pro Hac Vice 4. Defs' Motion to Admit Nicholas A. Varone Pro Hac Vice 5. Defs' Motion to Admit John W. Tienken Pro Hac Vice 6. Plts' Motion to Admit Andrew J. Ehrlich, Jane B. O'Brien, and Paul D. Brachman Pro Hac Vice	1. Allowed **03/10/2022** 2. Allowed **03/10/2022** 3. Allowed **03/10/2022** 4. Allowed **03/10/2022** 5. Allowed **03/10/2022** 6. Allowed **03/25/2022**
355P21	Daniel Ross v. N.C. State Bureau of Investigation	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA20-599) 2. Plt's Motion for Rule 34 Sanctions 3. Plt's Second Motion for Rule 34 Sanctions	1. Denied 2. Denied 3. Denied
358P21	Contaminant Control, Inc. v. Allison Holdings, LLC	Def's PDR Under N.C.G.S. § 7A-31 (COA20-531)	Denied
366P21	State v. Sharif Hakim Moore	1. Def's Pro Se Motion for Appeal 2. Def's Pro Se Motion for Appeal	1. Dismissed 2. Dismissed
378P21	State v. Calvin Gene McNeill	Def's PDR Under N.C.G.S. § 7A-31 (COA20-557)	Denied

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380P21	Hortense Pamela Hill v. David Warner Boone, M.D., and Raleigh Orthopaedic Clinic, P.A.	Plt's PDR Under N.C.G.S. § 7A-31 (COA20-488)	Denied **Newby, C.J., recused**
394PA21	Michael Mole' v. City of Durham, North Carolina, a Municipality	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA19-683) 2. North Carolina Fraternal Order of Police's Motion for Leave to File Amicus Brief in Support of PDR 3. Def's Motion to Designate Parties 4. Def's Motion to Reset 30-Day Deadline for Opening Briefs 5. Plt's Motion for Extension of Time to File Brief	1. Allowed **03/09/2022** 2. Denied **03/09/2022** 3. Special Order **03/29/2022** 4. Special Order **03/29/2022** 5. Special Order **03/29/2022**
396P21	State v. Kevin Ray Holliday	Def's PDR Under N.C.G.S. § 7A-31 (COA20-768)	Denied
404P21	State v. Halo Garrett	1. Def's Motion for Temporary Stay (COA19-1171) 2. Def's Petition for Writ of Supersedeas 3. Def's Notice of Appeal Based Upon a Constitutional Question 4. Def's PDR Under N.C.G.S. § 7A-31 5. State's Motion to Dismiss Appeal	1. Allowed **11/19/2021** Dissolved **05/04/2022** 2. Denied 3. --- 4. Denied 5. Allowed
406P21	State v. Jimmy Brown Rodriguez, II	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA20-850)	Denied
407A21	Quad Graphics, Inc. v. N.C. Department of Revenue	1. Multistate Tax Commission's Motion for Leave to File Amicus Brief 2. Multistate Tax Commission's Motion to Admit Richard L. Cram Pro Hac Vice 3. District of Columbia, et al.'s Motion to Admit Caroline S. Van Zile Pro Hac Vice 4. Petitioner's Motion to Admit Michael J. Bowen Pro Hac Vice	1. Allowed **01/21/2022** 2. Allowed **03/22/2022** 3. Allowed **03/22/2022** 4. Allowed **03/22/2022**

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414P21	T. Alan Phillips and Robert Warwick, in their capacities as co-Trustees of the Marital Trust created Under Section 2 of Article IV of the Hugh MacRae II Revocable Declaration of Trust; and Robert Warwick, Hugh MacRae III, and Nelson MacRae, in their capacities as co-Trustees of the Family Trust Created Under Section 3 of Article IV of the Hugh MacRae II Revocable Declaration of Trust which Family Trust is the sole remainder Beneficiary of the Marital Trust v. Eunice Taylor MacRae and Marguerite Bellamy MacRae, in her capacity as a beneficiary of the Family Trust	Defs' PDR Under N.C.G.S. § 7A-31 (COA20-903)	Allowed
417P21	State v. Kenneth Lewis Powell, Jr.	Def's Pro Se Motion to Dismiss Charges	Dismissed
425A21-1	Hoke County Board of Education, et al. v. State of North Carolina, et al.	1. Plts' Notice of Appeal Based Upon a Dissent (COAP21-511) 2. Plts' Notice of Appeal Based Upon a Constitutional Question 3. Plts' PDR Under N.C.G.S. § 7A-31 4. Plts' Petition in the Alternative for Writ of Certiorari to Review Order of the COA 5. Plt-Intervenors' (Rafael Penn, et al.) Motion to Admit David Hinojosa Pro Hac Vice	1. Special Order **03/18/2022** 2. Special Order **03/18/2022** 3. Special Order **03/18/2022** 4. Special Order **03/18/2022** 5. Allowed **03/18/2022**

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		6. Plt-Intervenors' (Rafael Penn, et al.) Notice of Appeal Based Upon a Dissent	6. Special Order **03/18/2022**
		7. Plt-Intervenors' (Rafael Penn, et al.) Notice of Appeal Based Upon a Constitutional Question	7. Special Order **03/18/2022**
		8. Plt-Intervenors' (Rafael Penn, et al.) PDR Under N.C.G.S. § 7A-31	8. Special Order **03/18/2022**
		9. Plt-Intervenors' (Rafael Penn, et al.) Petition for Writ of Certiorari to Review Order of the COA	9. Special Order **03/18/2022**
		10. Controller's Motion to Dismiss Appeals	10. Special Order **03/18/2022**
		11. Controller's Conditional Petition for Writ of Supersedeas	11. Special Order **03/18/2022**
		12. Legislative-Intervenors' Motion to Dismiss Appeals	12. Special Order **03/18/2022**
		13. State's Notice of Upcoming Filing	13. Dismissed as moot **03/18/2022**
425A21-2	Hoke County Board of Education, et al. v. State of North Carolina, et al.	1. State's PDR Prior to Determination by COA (COA22-86)	1. Special Order **03/18/2022**
		2. State's Motion to Set an Expedited Schedule	2. Special Order **03/18/2022**
		3. Plts' Conditional PDR Prior to Determination by COA	3. Special Order **03/18/2022**
		4. Trial Court Request for Extension of Time to File Order on Remand	4. Allowed **04/20/2022**
426P21	Daniel A. Young, Sr. v. Ryan Russell Megia	Plt's Pro Se Motion for Appeal	Dismissed
434P21	State v. Jessica Lea Metcalf	Def's PDR Under N.C.G.S. § 7A-31 (COA20-917)	Denied

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436A21	State of North Carolina *ex rel.* Joshua H. Stein, Attorney General v. E. I. Du Pont De Nemours and Company, et al.	1. Defs' Motion to Admit Joshua P. Ackerman Pro Hac Vice 2. State's Motion to Admit Levi Downing Pro Hac Vice 3. State's Motion to Admit Elizabeth Krasnow Pro Hac Vice 4. State's Motion to Admit Julia Schuurman Pro Hac Vice 5. State's Motion to Admit Lauren H. Shah Pro Hac Vice 6. State's Motion to Admit David Zalman Pro Hac Vice 7. Defs' Motion to Admit Katherine L.I. Hacker Pro Hac Vice 8. Defs' Motion to Deem Motion to Admit Katherine L.I. Hacker Pro Hac Vice Timely Filed	1. Allowed **04/04/2022** 2. Allowed **04/22/2022** 3. Allowed **04/22/2022** 4. Allowed **04/22/2022** 5. Allowed **04/22/2022** 6. Allowed **04/22/2022** 7. Allowed **05/03/2022** 8. Allowed **05/03/2022**
446A13-2	State v. Mario Andrette McNeill	1. State's Motion for Extension of Time to File Response to Petition for Writ of Certiorari 2. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Cumberland County 3. Def's Motion for Leave to File Reply in Support of Petition for Writ of Certiorari	1. Allowed **12/08/2021** 2. Special Order 3. Denied
454P20-4	State v. Nafis Abdullah-Malik	Def's Pro Se Motion to Order District Courts Clerks to Find, Locate, File, and Return Any Filings	Dismissed
476P03-3	State v. Sharoid Te-Juan Wright	Def's Pro Se Petition for Writ of Habeas Corpus (COA02-744)	Denied **03/11/2022**
495P20-2	US Bank v. Leland Thompson, et al.	1. Third-Party Claimant's Pro Se Motion for Notice of Appeal 2. Third-Party Claimant's Pro Se Motion for Demand for Jury Trial 3. Third-Party Claimant's Pro Se Motion for Notice of Default: Opportunity to Cure	1. Dismissed 2. Dismissed 3. Dismissed
567P04-4	State v. John Darrell Norman, Sr.	Def's Pro Se Motion for Appropriate Relief	Dismissed
580P05-26	In re David Lee Smith	1. Def's Pro Se Petition for Writ of Mandamus 2. Def's Pro Se Petition for Writ of Mandamus	1. Denied 2. Denied **Ervin, J., recused**

BARTLEY v. CITY OF HIGH POINT

[381 N.C. 287, 2022-NCSC-63]

BRUCE ALLEN BARTLEY
v.
CITY OF HIGH POINT AND MATT BLACKMAN IN HIS OFFICIAL CAPACITY AS A POLICE OFFICER WITH THE CITY OF HIGH POINT, AND INDIVIDUALLY

No. 359A20

Filed 17 June 2022

1. Appeal and Error—interlocutory order—substantial right—denial of summary judgment—assertion of public official immunity

Defendant police officer was entitled to appellate review of an order denying his motion for summary judgment where, although the order was interlocutory, the denial affected a substantial right because defendant asserted the defense of public official immunity.

2. Immunity—public official immunity—police officer—individual capacity—malice—summary judgment not appropriate

Where plaintiff, in asserting civil tort claims against a police officer in his individual capacity, forecast sufficient evidence to raise genuine issues of material fact regarding whether the officer acted with malice—including whether he used unnecessary and excessive force—when he arrested plaintiff for resisting an officer, the officer was not entitled to summary judgment based on the defense of public official immunity. Evidence that the plainclothes officer acted contrary to his duty and with intent to injure plaintiff included plaintiff's claims that the officer "body slammed" him against the trunk of his car; that the officer refused to loosen the handcuffs, which were tight enough to leave marks on plaintiff's wrists; and that the officer suggested to plaintiff that if he had done as he was initially told, then he would not have been handcuffed in front of his neighbors.

Justice BERGER dissenting.

Chief Justice NEWBY and Justice BARRINGER join in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 272 N.C. App. 224 (2020), affirming a trial court order partially denying defendant's motion for summary judgment entered on 21 October 2019 by Judge Eric C. Morgan in Superior Court, Guilford County. Heard in the Supreme Court on 23 March 2022.

The Deuterman Law Group, by Seth R. Cohen, for plaintiff-appellee.

Poyner Spruill LLP, by David L. Woodard and Brett A. Carpenter, for defendant-appellant.

EARLS, Justice.

¶ 1 The sole question we consider in this appeal is whether the Court of Appeals erred in affirming the trial court's denial of Defendant Officer Matt Blackman's (Officer Blackman) motion for summary judgment with respect to Plaintiff Bruce Bartley's (Mr. Bartley) claims against him in his individual capacity based upon the defense of public official immunity, concluding that genuine issues of material fact exist as to whether Officer Blackman acted with malice when he arrested Mr. Bartley for unlawfully resisting, delaying, or obstructing a public officer in discharging or attempting to discharge a public duty in violation of N.C.G.S. § 14-223. We hold that when viewing the evidence in the light most favorable to Mr. Bartley, genuine issues of material fact do exist as to whether Officer Blackman acted with malice in the performance of his duties when he allegedly used excessive force in arresting Mr. Bartley. Therefore, Officer Blackman is not entitled to summary judgment based upon the defense of public official immunity. We affirm the Court of Appeals' affirmance of the trial court's order.

I. Background

¶ 2 Mr. Bartley was driving to his home in the afternoon on 23 August 2017 when he crossed a double yellow line to pass the pickup truck that was traveling on Old Mill Road directly in front of him. Mr. Bartley testified in his deposition that he believed passing the slow-moving truck on a double yellow line was legal because the car was traveling at a low rate of speed and impeding traffic. Officer Blackman, a police officer with the City of High Point, testified in his deposition that he was traveling behind Mr. Bartley in an unmarked patrol car when he observed Mr. Bartley pass the truck over the double yellow line. Officer Blackman testified that at that point he activated his blue strobe lights, air horn, and siren, and began catching up to Mr. Bartley's car. Mr. Bartley testified that he did not see anyone behind him when he looked in the rearview mirror, that he did not see blue lights flashing, and that he did not hear a siren or air horn as he proceeded in the direction of his home.

¶ 3 When Mr. Bartley eventually reached his driveway, he parked, got out of the car, and walked toward the back of his car to retrieve his pet cat. At that moment, he heard someone, whom he identified as a male

dressed in plainclothes, twice order him back inside his car. While Officer Blackman testified that he was wearing his departmental issued handgun on his right hip, handcuffs, and an additional ammunition magazine on his left side, that he was carrying his department issued radio in his left hand, and that his badge was on his belt and visible from the front, it is uncontested that Officer Blackman was not dressed in his police uniform and that he did not immediately identify himself as a police officer when he approached Mr. Bartley's driveway and issued commands. Mr. Bartley testified that because he had no reason to know that the person giving him a command was a police officer, he thought that he had done nothing wrong, and suspected that perhaps Officer Blackman was at the wrong address, Mr. Bartley told Officer Blackman that he was on private property and that he was not going to get back into his car.

¶ 4 Officer Blackman testified that after Mr. Bartley twice ignored his command, Officer Blackman used his hand radio to report the traffic stop to law enforcement communications. He gave a description of his location, Mr. Bartley, and Mr. Bartley's vehicle. Officer Blackman further testified that he requested backup because he believed that there was an officer safety issue based on Mr. Bartley's response to his command to get back into his vehicle "in the face of a traffic stop." Mr. Bartley testified that when he turned his back on Officer Blackman after telling Officer Blackman, who from Mr. Bartley's perspective, was an unidentified trespasser, that he was on private property and that he would not get back into his car, "the next thing" [Mr. Bartley] knew, he was "body slammed" against the trunk of his vehicle, handcuffed, and told he was being detained.

¶ 5 Mr. Bartley testified repeatedly that "[Officer Blackman] slammed me against the back trunk lid of my vehicle and handcuffed me." Officer Blackman testified that he put Mr. Bartley in handcuffs because (1) Mr. Bartley ignored his commands and told him that he was on private property, which Officer Blackman believed to create a safety issue because he had no way of knowing Mr. Bartley's intentions, and (2) Officer Blackman believed that Mr. Bartley's refusal to comply with Officer Blackman's commands to get back in the car constituted probable cause to charge Mr. Bartley with resisting, delaying, or obstructing a public officer. Officer Blackman denied that he body slammed and tightly handcuffed Mr. Bartley when he carried out the arrest.

¶ 6 Mr. Bartley testified that following his arrest, he remained in handcuffs in his driveway in full view of his neighbors for 20–25 minutes even after he was patted down by Officer Blackman and even though a backup officer had been called to the scene. Mr. Bartley further stated

that he asked Officer Blackman to loosen the handcuffs because they were too tight and were hurting his wrists, but Officer Blackman refused and insisted that if Mr. Bartley had done as he was initially told, then he would not have been in this situation. Mr. Bartley claims that the forcefully applied handcuffs left red marks and bruises on his wrists, which he photographed on the day of the incident.

¶ 7 Mr. Bartley was charged with violating N.C.G.S. § 14-233 (resisting, delaying, and obstructing a public officer) for exiting his vehicle and refusing to obey commands.[1] He also was cited for passing another vehicle in a prohibited passing zone over a double yellow line pursuant to N.C.G.S. § 20-146(a). Mr. Bartley hired an attorney who advised him to take a driving class and complete twenty hours of community service, both of which he did. It is uncontested that the charges against Mr. Bartley were dismissed.

¶ 8 On 20 December 2018, Mr. Bartley filed a civil suit against Officer Blackman, in both his official and individual capacities; and against the City of High Point; for malicious prosecution, false imprisonment/arrest, and assault and battery. Defendants answered the complaint on 25 January 2019, asserting the defenses of governmental and public official immunity, among others. In his complaint, Mr. Bartley alleged that he was forcibly thrown against the trunk of his car, handcuffed, and charged with resisting an officer in the driveway of his residence after passing a slow-moving vehicle on Old Mill Road and being followed by Officer Blackman, a plain-clothes High Point police detective driving an unmarked vehicle.

¶ 9 On 19 September 2019, defendants filed a general motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure on the grounds that there was no genuine issue as to any material fact and that defendants were entitled to judgment as a matter of law. On 21 October 2019, the trial court dismissed with prejudice Mr. Bartley's claims against the City of High Point and Officer Blackman in his official capacity on the ground that sovereign immunity barred those claims. The trial court denied defendants' summary judgment motion as to the claims against Officer Blackman in his individual capacity "finding that there are genuine issues of material fact as to these claims that preclude summary judgment as a matter of law." Officer Blackman

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1. The dissent asserts that "[i]t is undisputed that Officer Blackman had probable cause to arrest Bartley." 2022-NCSC-63, ¶ 46. However, that is disputed. Among his other claims, Mr. Bartley sued Officer Blackman for false arrest whereby he challenges the lawfulness of his detainment. The issue of whether Officer Blackman had probable cause to arrest Mr. Bartley for violating N.C.G.S. § 14-223 is not before us.

appealed from the order partially denying his motion for summary judgment as to the claims against him in his individual capacity.

II. Court of Appeals Opinion

¶ 10 On appeal, Officer Blackman argued that the trial court erred in denying his motion for summary judgment based upon the defense of public official immunity. He also asked the Court of Appeals to address the merits of the claims against him. On 7 July 2020, a divided panel of the Court of Appeals affirmed the trial court's order, concluding that Officer Blackman was not entitled to summary judgment on the ground of public official immunity, and declined to reach the merits of the underlying claims because Officer Blackman had no right to interlocutory review on the other issues he sought to raise. *Bartley v. City of High Point*, 272 N.C. App. 224 (2020). The court explained that "[p]olice officers engaged in performing their duties are public officials for the purposes of public official immunity [and] enjoy absolute immunity from personal liability for discretionary acts done without corruption or malice." *Id.* at 227–28 (cleaned up). The court noted that a police officer is therefore generally "immune from suit unless the challenged action was (1) outside the scope of official authority, (2) done with malice, or (3) corrupt," *id.* at 228, and ultimately concluded that the facts of this case as alleged with respect to each claim were sufficient to raise an issue of genuine material fact as to whether Officer Blackman acted with malice.

¶ 11 In dissent, Judge Tyson concluded that Mr. Bartley "did not carry his 'heavy burden' to survive Officer Blackman's motion for summary judgment on the issue of his individual liability under public official immunity." *Id.* at 239–40 (Tyson, J., dissenting). Judge Tyson reasoned that some of Mr. Bartley's admissions about a civilian's right to ignore an officer's directives during an investigatory stop and his general admissions about some of his alleged movements during the encounter were "sufficient to defeat [his] claims." *Id.* at 237. The dissent further opined that Mr. Bartley had "not met his 'heavy burden' 'to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a prima facie case at trial.' " *Id.* (quoting *Leete v. Cty. of Warren*, 341 N.C. 116, 119 (1995); *Draughon v. Harnett Cnty. Bd. of Educ.*, 158 N.C. App. 208, 212 (2003)). In Judge Tyson's view, the majority's opinion misapplied the standard of review and purported to shift the "heavy burden" Mr. Bartley must carry to prevail in this context. *Id.* Judge Tyson concluded that "[no] genuine issues of material fact exist in the pleadings, depositions, and affidavits served and entered in this matter to overcome defendant's motions and to deny summary judgment," and that the trial court's ruling should have therefore

been reversed and remanded for entry of summary judgment in favor of Officer Blackman. *Id.* at 240.

¶ 12 Officer Blackman appealed the Court of Appeals' decision to this Court as a matter of right based on Judge Tyson's dissent.

III. Standard of Review

¶ 13 Summary judgment is proper only "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." N.C.G.S. § 1A-1, N.C. R. Civ. P. 56(c); *see also Singleton v. Stewart*, 280 N.C. 460, 464–65 (1972). "An issue is genuine if it 'may be maintained by substantial evidence.' " *City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 654 (1980) (quoting *Koontz v. City of Winston-Salem*, 280 N.C. 518, 518 (1972)). Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion. *State v. Mann*, 355 N.C. 294, 301 (2002). An issue is material if, as alleged, facts "would constitute a legal defense, or would affect the result of the action or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *Koontz*, 280 N.C. at 518. When examining a summary judgment motion, " 'all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion.' " *Caldwell v. Deese*, 288 N.C. 375, 378 (1975) (quoting 6 James Wm. Moore, *Moore's Federal Practice* § 56.15[3], at 2337 (2d ed. 1971)).[2] This standard requires us to refrain from weighing the evidence or making credibility determinations. *Howerton v. Arai Helmet, Ltd.* 358 N.C. 440, 471 (2004) (explaining that when reviewing a motion for summary judgment, it is not the function of the court to weigh conflicting record evidence and that issues "legitimately called into question" should be preserved for resolution by a jury); *see also Hensley ex rel. North Carolina v. Price*, 876 F.3d 573, 584 (4th Cir. 2017) (observing that in the summary judgment posture, courts must not credit defendant's evidence, weigh the evidence, or resolve factual disputes in the defendants' favor).

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2. The dissent's statement of the proper standard at summary judgment fails to acknowledge this principle of black letter law and disregards it. It may be true that "[i]t is a difficult time to be in law enforcement" but our task here is not to weigh the competing deposition testimony, decide whose version of the events is correct, substitute our judgment for that of a jury, give preferential consideration to law enforcement officers, or provide them absolute immunity from any liability no matter what they do. At this stage, the question is whether the evidence, taken in the light most favorable to the non-moving party, creates a disputed issue of material fact related to public official immunity. *See, e.g.*, *Ussery v. Branch Banking and Trust Co.*, 368 N.C. 325, 334 (2015) (facts must be viewed in light most favorable to the non-moving party on motion for summary judgment).

¶ 14 We review a trial court's order granting or denying summary judgment de novo. *Craig v. New Hanover Cnty. Bd. of Educ*, 363 N.C. 334, 337 (2009). "Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* (cleaned up).

IV. Analysis

A. Jurisdiction

¶ 15 **[1]** Officer Blackman appeals from the trial court's order partially denying summary judgment on Mr. Bartley's claims against him in his individual capacity. Accordingly, we first address the threshold issue of the reviewability of an order denying Officer Blackman's motion for summary judgment.

¶ 16 Ordinarily, the denial of a summary judgment motion is not immediately appealable as an interlocutory order. *See Veazey v. City of Durham*, 231 N.C. 354, 357 (1950). An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court to settle and determine the entire controversy. *Id.* An immediate appeal does not lie to this Court from an interlocutory order unless it concerns a judicial decision affecting a substantial right claimed in the action or proceeding by the appellant. *Id.* The "substantial right" test for appealability asks whether the challenged order "will work injury to appellant if not corrected before appeal from final judgment." *Stanback v. Stanback*, 287 N.C. 448, 453 (1975); *see also* N.C.G.S. § 1-277.

¶ 17 The denial of summary judgment on the ground of public official immunity is immediately appealable because it affects a substantial right. Public official immunity is more than a mere affirmative defense to liability as it shields a defendant entirely from having to answer for his conduct in a civil suit for damages. *See Thompson v. Town of Dallas*, 142 N.C. App. 651, 653 (2001) (quoting *Epps v. Duke University, Inc.*, 122 N.C. App. 198, 201 (1996)) (explaining that an interlocutory appeal of an order denying a dispositive motion is allowed because "the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action."), *disc. review denied*, 344 N.C. 436 (1996)); *see also Summey v. Barker*, 142 N.C. App. 688, 689 (2001); *Leonard v. Bell*, 254 N.C. App. 694, 697 (2017). If the trial court erroneously precludes a valid claim of public official immunity and the case proceeds to trial, immunity from trial would be effectively lost. *Corum v. Univ. of North Carolina*, 97 N.C. App. 527, 532 (1990) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985)), *rev'd in part on other grounds*, 330 N.C. 761 (1992).

¶ 18 Unquestionably, the trial court's order denying Officer Blackman's motion for summary judgment is interlocutory; it does not dispose of the action against him and leaves matters to be judicially determined between the parties which requires further action by the trial court. However, Officer Blackman asserts a claim of public official immunity, an immunity from suit that would be compromised if he were required to go to trial. Therefore, this interlocutory appeal of the denial of summary judgment on that issue is properly before this Court.

B. Public Official Immunity

¶ 19 Public official immunity, a judicially-created doctrine, is "a derivative form" of governmental immunity which shields public officials from personal liability for claims arising from discretionary acts or acts constituting mere negligence, by virtue of their office, and within the scope of their governmental duties. Since the early twentieth century, the chief function of public official immunity has long been understood to shield public officials from tort liability when those officials truly perform discretionary acts that do not exceed the scope of their official duties. *See generally Hipp v. Ferrall*, 173 N.C. 167 (1917); *Templeton v. Beard*, 159 N.C. 63 (1912). The immunity has been recognized in furtherance of two primary goals. First, it promotes the "fearless, vigorous, and effective administration" of government policies. *Pangburn v. Saad*, 73 N.C. App. 336, 344 (1985). It is presumed that in the absence of the immunity, liability concerns rather than the public interest may drive the actions of some public officials. Second, it mitigates the negative impact that trepidation about personal liability might otherwise have on the willingness of individuals to assume public office. *Id.* (observing that, without public official immunity, the "threat of suit could . . . deter competent people from taking office"). *See also Isenhour v. Hutto*, 350 N.C. 601, 610 (1999) ("Public officials receive immunity because it would be difficult to find those who would accept public office or engage in the administration of public affairs if they were to be personally liable for acts or omissions involved in exercising their discretion." (cleaned up).

¶ 20 Public official immunity has therefore never been extended to an official who, clothed with discretion, commits acts that are at odds with the protections afforded by the doctrine and which underlie its utility. An individual will not enjoy the immunity's protections if his action "was (1) outside the scope of official authority, (2) done with malice, or (3) corrupt." *Wilcox v. City of Asheville*, 222 N.C. App. 285, 230 (2012) (citing *Smith v. State*, 289 N.C. 303, 331 (1976)), *disc. review denied and appeal dismissed*, 366 N.C. 574 (2013). Generally, public officials have been recognized as individuals who occupy offices created by statute,

take an oath of office, and exercise discretion in the performance of their duties. *Pigott v. City of Wilmington*, 50 N.C. App. 401, 403–04 (1981); *Gunter v. Anders*, 114 N.C. App. 61, 67 (1994). North Carolina courts have deemed police officers engaged in performance of their duties as public officials for the purposes of public official immunity: "a police officer is a public official who enjoys absolute immunity from personal liability for discretionary acts done without corruption or malice." *Campbell v. Anderson*, 156 N.C. App. 371, 376 (2003).

¶ 21 Our precedent instructs that "[i]t is well settled that *absent evidence to the contrary*, it will always be presumed 'that public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law.' " *Leete v. Cty. of Warren*, 341 N.C. 116, 119 (1995) (emphasis added) (quoting *Huntley v. Potter*, 255 N.C. 619, 628 (1961)). This Court has never regarded the presumption of good faith that attends a public officer's actions as conclusive. When read in its full context, this language creates a rebuttable presumption that loses its force when a party produces competent and substantial evidence that an officer failed to discharge his duties in good faith. *Id.*, 341 N.C. at 119 (plaintiffs have met their burden to overcome this presumption).

¶ 22 Significantly, our courts have recognized public official immunity as an affirmative defense that must be properly asserted by the defendant to receive its protection. *See generally Fullwood v. Barnes*, 250 N.C. App. 31 (2016); *Mabrey v. Smith*, 144 N.C. App. 119 (2001). In other words, the defendant must assert official immunity as an affirmative defense because

> [a]s to such defenses, he is the actor, and hence he must establish his allegations in such matters by the same degree of proof as would be required if he were plaintiff in an independent action. This is not a shifting of the burden of proof; it simply means that each party must establish his own case.

Speas v. Merchants' Bank & Trust Co. of Winston-Salem, 188 N.C. 524, 531 (1924) (citations omitted); *see also*, 1 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 32 n. 29, at 120 (4th ed. 1993). If the defendant cannot meet this burden of production, "he is not entitled to protection on account of his office, but is liable for his acts like any private individual." *Gurganious v. Simpson*, 213 N.C. 613, 616 (1938).

C. Public Official Immunity Applied in this Case

¶ 23 **[2]** To survive a motion for summary judgment based on public official immunity, a plaintiff must make a prima facie showing that the

defendant-official's tortious conduct falls within one of the immunity exceptions. *Dempsey v. Halford*, 183 N.C. App. 637, 640–41 (2007). A tortious act that is malicious thus pierces the cloak of official immunity that would otherwise bar suit and liability for the tortious act. *Fox v. City of Greensboro*, 279 N.C. App. 301, 2021-NCCOA-489, ¶ 51 (2021). This Court has held that "[a] defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another." *In re Grad v. Kaasa*, 312 N.C. 310, 313 (1984). Elementally, a malicious act is one which is "(1) done wantonly, (2) contrary to the actor's duty, and (3) intended to be injurious to another." *Wilcox*, 222 N.C. App. at 289. "An act is wanton when it is done of wicked purpose or when done needlessly, manifesting a reckless indifference to the rights of others." *Yancey v. Lea*, 354 N.C. 48, 52 (2001). "Gross violations of generally accepted police practice and custom" contributes to the finding that officers acted contrary to their duty. *Prior v. Pruett*, 143 N.C. App. 612, 623–24 (2001), *disc. review denied*, 355 N.C. 493 (2002).

¶ 24 We have held that "the intention to inflict injury may be constructive" intent where an individual's conduct "is so reckless or so manifestly indifferent to the consequences, where the safety of life or limb is involved, as to justify a finding of willfulness and wantonness equivalent in spirit to an actual intent." *Foster v. Hyman*, 197 N.C. 189, 192 (1929). In the context of intentional tort claims, including assault and battery, "[w]anton and reckless behavior may be equated with an intentional act." *Pleasant v. Johnson*, 312 N.C. 710, 715 (1985), and "evidence of constructive intent to injure may be allowed to support the malice exception to [public official] immunity." *Wilcox*, 222 N.C. App. at 291.

¶ 25 Mr. Bartley claims that Officer Blackman acted with malice by body slamming him against the trunk of his car and tightly handcuffing him without justification. Thus, we decide whether, viewed in the light most favorable to Mr. Bartley, the evidence raises a genuine issue of material fact concerning whether Officer Blackman acted with malice; that is, whether his actions were wanton, contrary to his duty, and intended to injure Mr. Bartley. We hold that the evidence in this case does raise an issue of material fact with respect to this question.

¶ 26 At common law, a "law enforcement officer has the right, in making an arrest and securing control of an offender, to use only such force as may be reasonably necessary to overcome any resistance and properly discharge his duties." *Lopp v. Anderson*, 251 N.C. App. 161, 172 (2016). While an officer is vested with such a right, "[a police officer] may not act maliciously in the wanton abuse of his authority or use unnecessary

and excessive force." *Myrick v. Cooley*, 91 N.C. App. 209, 215 (1988). In similar fashion, our General Statutes dictate that a law enforcement officer is justified in using force upon an individual when and to the extent that the officer reasonably believes it necessary to prevent escape from custody or to effect an arrest of an individual who the officer reasonably believes has committed a criminal offense, unless the officer knows the arrest is unauthorized. *See* N.C.G.S. § 15A-401(d). Accordingly, a civil action for damages for assault and battery is available at common law against one who, for the accomplishment of a legitimate purpose, such as justifiable arrest, uses force which is excessive under the given circumstances. *Lopp*, 251 N.C. App. at 172 (2016) (quoting *Myrick*, 91 N.C. App. at 215).

¶ 27 Mr. Bartley testified that Officer Blackman approached him from behind and "body slammed" him against the trunk of his car. Officer Blackman acknowledged during his deposition that Mr. Bartley did not resist arrest, verbally or physically threaten him, or try to evade the arrest before he placed Mr. Bartley in handcuffs. It is also undisputed that Mr. Bartley was unarmed during the encounter. Officer Blackman's actions in these circumstances, as described by Mr. Bartley, using a body slam maneuver to subdue an unarmed, nonresistant individual who posed no threat to him is evidence of malice.

¶ 28 Additional evidence of malice comes from Mr. Bartley's testimony about how tightly Officer Blackman handcuffed him, Officer Blackman's refusal to loosen the handcuffs, and the red marks and bruises that Mr. Bartley sustained to his wrist as a result. Furthermore, Mr. Bartley testified that Officer Blackman stated that if Mr. Bartley had done as he was initially told, he would not be in the situation that he was in, and that Mr. Bartley remained handcuffed for at least twenty minutes in front of neighbors, which is evidence of retaliation.

¶ 29 Cases from the federal courts are instructive on the question of whether tight handcuffing resulting in physical injury indeed constitutes excessive force and therefore some evidence of malice. The Third Circuit and the Sixth Circuit have affirmatively recognized the general proposition that excessively tight or forceful handcuffing, particularly handcuffing that results in physical injury, constitutes excessive force. *See*, *e.g.*, *Kopec v. Tate*, 361 F.3d 772, 777 (3d Cir. 2004) (recognizing excessively tight handcuffing constitutes excessive force), *cert denied*, 543 U.S. 956 (2004); *Martin v. Hiedeman*, 106 F.3d 1308, 1313 (6th Cir. 1997) (construing "excessively forceful handcuffing" as an excessive force claim).

¶ 30 The Sixth Circuit articulated its test for evaluating whether a handcuffing claim may survive summary judgment in *Morrison v. Bd. Of Trs.*, 583 F.3d 394, 401-02 (6th Cir. 2009). To state such a claim, a plaintiff must offer sufficient evidence to create a genuine issue of material fact that: (1) the plaintiff complained the handcuffs were too tight; (2) the officer ignored those complaints; and (3) the plaintiff experienced "some physical injury" resulting from the handcuffing. *Id*. *See also McGrew v. Duncan*, 937 F.3d 664, 668 (6th Cir. 2019) (holding that allegations of bruising and wrist marks create a genuine issue of material fact regarding whether an officer violated plaintiff's right to be free from excessive force). *Cf. Brissett v. Paul*, No. 97-6898, 1998 WL 195945, at *4–5 (4th Cir. 1998) (unpublished) (affirming the district court's decision that a police officer did not use excessive force because plaintiff did not offer evidence that he sustained any physical injury from being handcuffed and arms being held in painful position).

¶ 31 Mr. Bartley's evidence establishes that he complained of his discomfort, and Officer Blackman refused to heed his complaints and loosen the handcuffs. To be sure, Officer Blackman's testimony offers an entirely different description of the material facts. He testified that he effectuated Mr. Bartley's arrest by "merely plac[ing] one hand on [Mr. Bartley's] wrist" and his other hand on [Mr. Bartley's] "[u]pper back," and leaning Mr. Bartley over the trunk lid of his car so that he was "[b]ending at the waist." Officer Blackman further testified that he "took [Mr. Bartley] by the left arm and went to extend his arm and then to put it behind his back." Officer Blackman also insisted that when Mr. Bartley refused his multiple orders to get back in his vehicle, he was authorized to place Mr. Bartley in handcuffs to protect his safety and carry out the traffic stop. He emphasized in his testimony that his use of handcuffs "remained the least intrusive means reasonably necessary to carry out the purpose of the stop." Officer Blackman's testimony certainly creates a disputed issue of material fact; however, it is not the version of events that is determinative on summary judgment, where the question before us is whether the evidence in the light most favorable to the non-moving party is sufficient to establish malice that defeats a claim of public official immunity.

¶ 32 N.C.G.S. § 15A-401(d), as does the common law, prescribes that police officers have a duty to use only the force that is reasonably necessary in detaining an individual. The use of unreasonable, unnecessary, and excessive force is prohibited by law. Considering the facts in the light most favorable to Mr. Bartley, as we must, there is a panoply of evidence which establishes that a genuine issue of material

fact exists as to whether Officer Blackman's allegedly forcible tactics were contrary to his duty for purposes of establishing the first element of malice.[3] Furthermore, Officer Blackman's alleged statement to Mr. Bartley that he would not have been "in this situation" had Mr. Bartley obeyed commands from Officer Blackman raises questions that can only be resolved by a jury. For example, is "this situation" that Officer Blackman referenced the situation of having just been body slammed and thrown into the trunk of a car, tightly handcuffed and bruised, and humiliated in front of neighbors following the commission of a traffic infraction? This statement creates a genuine issue of material fact concerning whether Officer Blackman's allegedly gratuitous tactics manifested a reckless indifference to Mr. Bartley's rights and were so reckless or manifestly indifferent to the consequences, where the safety of life and limb are involved, as opposed to being necessary for officer safety as Officer Blackman insists. *See Wilcox*, 222 N.C. App. at 291-92. Such a question is a factual one that is typically reserved for a jury. *See*, *e.g.*, *State v. McCombs*, 297 N.C. 151, 156 (1979); *Leiber v. Arboretum Joint Venture, LLC*, 208 N.C. App. 336, 348 (2010). Mr. Bartley has presented sufficient evidence of malice to create a disputed issue of material fact that prevents summary judgment on the ground of public official immunity.

V. Conclusion

¶ 33 To establish that Officer Blackman is not entitled to the defense of public official immunity, and thus to defeat his motion for summary judgment, Mr. Bartley produced evidence that Officer Blackman acted with malice when he arrested him. Viewing the facts that Mr. Bartley has proffered in support of his claim in the light most favorable to him, we conclude that there is a genuine issue of material fact as to whether Officer Blackman acted with malice in carrying out his official duties.

¶ 34 The purpose of summary judgment is to dispose of claims in which there are no disputed issues as to any material facts such that "only questions of law are involved and a fatal weakness in the claim of a party is exposed." *Dalton v. Camp*, 353 N.C. 647, 650 (2001). Attempts to make credibility determinations or to resolve disputed versions of

3. The dissent states that "Officer Blackman had probable cause to arrest Bartley." 2022-NCSC-63, ¶ 45. Whether there was probable cause for an arrest is disputed, and it is also not determinative on the question of public official immunity. Where, as here, a plaintiff comes forward with evidence that an officer used excessive force to execute an otherwise valid arrest, such evidence may be sufficient to establish a genuine dispute of material fact concerning whether the officer acted wantonly or contrary to his duty within the meaning of the malice exception to public official immunity.

events in the course of prematurely disposing of this case serves only to confuse the role of a judge and a jury. *Crocker v. Roethling*, 363 N.C. 140, 142–43 (2009) (instructing that it is error for the trial court to enter summary judgment for defendant when the evidence forecast by plaintiff established a genuine issue of material fact to be properly decided by a jury). We therefore hold that the Court of Appeals did not err in affirming the trial court's order partially denying Officer Blackman's summary judgment motion on the basis of public official immunity.

AFFIRMED.

Justice BERGER dissenting.

¶ 35 It is a difficult time to be in law enforcement. The majority today makes it even more challenging by expanding exposure to personal liability for increasingly common encounters with recalcitrant members of our society. Because the majority effectively eliminates public official immunity for law enforcement officers in North Carolina, I respectfully dissent.

¶ 36 On August 23, 2017, at approximately 3:17 pm, Officer Blackman—at the time an eight-year veteran of the High Point Police Department—was driving in his unmarked patrol car on routine patrol. At the time, Officer Blackman was wearing his department "issued handgun on [his] right side, [his] departmental issued badge on [the front of his] belt, [and his] handcuffs and additional magazine on [his] left side." Officer Blackman observed a 2017 Mercedes pass a truck "on the left over the double yellow line." The vehicle was operated by Bruce Allen Bartley, a 5'7" white male. Officer Blackman testified that he viewed Bartley's moving violation of passing the truck on the left over a double line as serious and as dangerous as the other violations he has observed and cited.

¶ 37 Officer Blackman attempted to initiate a traffic stop of Bartley's vehicle, however due to oncoming traffic and an upcoming curve, Officer Blackman could not immediately and safely pass the truck in front of him to catch up to Bartley. As he overtook the truck, Officer Blackman activated his lights and siren and began catching up with Bartley's vehicle to make the traffic stop. Bartley turned onto Yates Mill Court, and Officer Blackman testified that he "was concerned that [Bartley] was aware [Officer Blackman] was behind him and [he] was attempting to make it to the – a house."

¶ 38 Bartley pulled into the driveway at 1860 Yates Mill Court and Officer Blackman pulled in behind Bartley. Officer Blackman left his blue

strobe lights on, but "as [he] was nearing the back of [Bartley's] car," he turned off his siren. Bartley got out of his vehicle and was "[h]eading towards the back" [of the vehicle] when he saw Officer Blackman. Officer Blackman got out of his vehicle and ordered Bartley back into the Mercedes. Bartley looked directly at Officer Blackman and ignored the order.

¶ 39 Bartley testified at a deposition that, in total, Officer Blackman told him to get back in the car "[t]wice." Bartley's response was, "[I] told him I was on private property" and "I was not getting back in the car."

¶ 40 Officer Blackman testified at his deposition that he "believed that there was an officer safety issue based on [Bartley] exiting the vehicle, approaching [Officer Blackman], [and] saying he's on private property in the face of a traffic stop." Officer Blackman testified "ultimately we got within arms reach of [each] other." Because of Bartley's actions, Officer Blackman believed that handcuffing Bartley "was the safest for both of [them]." At that point, Officer Blackman had no way of knowing what Bartley's intentions were toward him or toward any other aspect of the traffic stop. Officer Blackman told Bartley he was being detained, and Bartley admitted that Officer Blackman placed one hand on his wrist and the other on Bartley's upper back. Bartley was "leaning over the vehicle . . . [b]ending at the waist," when Officer Blackman went to handcuff him. Officer Blackman "took [Bartley] by the left arm and went to extend [Bartley's] arm and then put it behind [Bartley's] back, and as [Officer Blackman] did that, [Bartley's] left arm tensed up and lifted up in a form of resistance." At this point, Officer Blackman had probable cause to arrest Bartley for resisting a public officer pursuant to N.C.G.S. §14-223.

¶ 41 According to Bartley, he was in that position for "seconds" while Officer Blackman put on the handcuffs. When asked whether Bartley felt any contact with Officer Blackman's body, Bartley responded, "[j]ust his hands."

¶ 42 Summary judgment is "a device to bring litigation to an early decision on the merits without the delay and expense of a trial where it can be readily demonstrated that no material facts are in issue." *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971).

> The purpose of summary judgment is to eliminate formal trials where only questions of law are involved by permitting penetration of an unfounded claim or defense in advance of trial and allowing summary disposition for either party when a fatal weakness in

> the claim or defense is exposed. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E.2d 379 (1975). "The device used is one whereby a party may in effect force his opponent to produce a forecast of evidence which he has available for presentation at trial to support his claim or defense. A party forces his opponent to give this forecast by moving for summary judgment. Moving involves giving a forecast of his own which is sufficient, if considered alone, to compel a verdict or finding in his favor on the claim or defense. In order to compel the opponent's forecast, the movant's forecast, considered alone, must be such as to establish his right to judgment as a matter of law." 2 McIntosh, N. C. Practice and Procedure, s 1660.5 (2d ed. Phillips Supp.1970).

Moore v. Fieldcrest Mills, Inc., 296 N.C. 467, 470, 251 S.E.2d 419, 422 (1979). Summary judgment is appropriate "where a claim or defense is utterly baseless in fact, [or] where only a question of law on the indisputable facts is in controversy and it can be appropriately decided without full exposure of trial." *Kessing*, 278 N.C. at 533, 180 S.E.2d at 829. "[N]o matter how material a fact may be to the determination of an issue in a case, if it is patently false or its existence defies all common sense and reason, it is not genuine." G. Gray Wilson, North Carolina Civil Procedure § 56-4 (3d ed. 2007).

¶ 43 This Court has held that public officials are entitled to a presumption that they will "discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law." *Leete v. Cty. of Warren*, 341 N.C. 116, 119, 462 S.E.2d 476, 478 (1995). The party challenging the validity of a public official's actions bears a heavy burden; competent and substantial evidence is required to defeat this presumption. *Id.* For purposes of public official immunity, law enforcement officers engaged in the performance of their duties are public officials protected from liability "for mere negligence." *See Smith v. State*, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976). It is uncontroverted that Officer Blackman was performing his duties as a law enforcement officer when he initiated the traffic stop that led to Bartley's arrest.

> As long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption, he is protected from liability. A defendant acts with malice

> when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another. An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others.

Grad v. Kaasa, 312 N.C. 310, 313, 321 S.E.2d 888, 890–91 (1984) (cleaned up).

¶ 44 As such, the burden now rests with plaintiff to show that Blackman acted with malice to overcome the presumption, and the trial court must decide "whether plaintiff sufficiently forecasted evidence for each element of malice." *Brown v. Town of Chapel Hill*, 233 N.C. App., 257, 265, 756 S.E.2d 749, 755. Bartley has failed to make such a forecast of the evidence, and Officer Blackman is entitled to summary judgment because there is no genuine issue of material fact.

¶ 45 Officer Blackman had probable cause to arrest Bartley. Bartley committed a traffic infraction by crossing over a double yellow line to pass another vehicle, did not immediately pull over when Officer Blackman initiated his siren and strobe light, and resisted arrest after Officer Blackman had issued multiple commands which Bartley acknowledged he heard. Bartley admitted that refusing to obey a police officer's command is unlawful and acknowledged that he could understand Officer Blackman's perspective in arresting Bartley.

¶ 46 The majority holds that genuine issues of material fact exist as to whether Officer Blackman acted with malice in performance of his duties when he allegedly used excessive force in arresting Bartley. Specifically, the majority focuses on Bartley's deposition testimony in which he alleged that Officer Blackman approached him from behind and "body slammed" him against the trunk of his car. The term "body slam" was used just once by Mr. Bartley in his deposition and twice in a written statement Bartley prepared for his own benefit. Bartley's testimony regarding Officer Blackman's specific actions is wholly inconsistent with the definition of the term "body slam." Merriam-Webster defines body slam as "a wrestling throw in which the opponent's body is lifted and brought down hard to the mat." *Body-Slam*, *Merriam-Webster Dictionary* (11th ed. 2003); *see also*, *Body Slam*, https://www.dictionary.com/browse/body-slam (accessed June 7, 2022). While Bartley's single reference in his deposition to being body slammed may not be patently false, it appears to be baseless in fact in that it runs counter to his step-by-step testimony of Officer Blackman's actions. According to Bartley, Officer

Blackman had one hand on Bartley's wrist and the other on Bartley's upper back. It defies common sense that from this position Officer Blackman lifted Bartley's body off the ground and then hurled him onto the trunk of Bartley's vehicle, without any other part of Officer Blackman's body making contact with Bartley. In addition, Bartley testified that he suffered no harm, perceived, or otherwise, from Officer Blackman placing him on the trunk of his vehicle. The only purported harm that Bartley experienced during the entire encounter was related to the tightness of the handcuffs, not due to a body slam. It is undisputed that Officer Blackman had probable cause to arrest Bartley, and Officer Blackman was not acting contrary to his duty when he detained and handcuffed Bartley.

¶ 47 Bartley was also required to produce "competent and substantial evidence" that Officer Blackman possessed an intent to injure. To establish an intent to injure, "the plaintiff must show at least that the officer's actions were so reckless or so manifestly indifferent to the consequences as to justify a finding of willfulness and wantonness equivalent in spirit to an actual intent." *Brown*, 233 N.C. App. at 269, 756 S.E.2d at 758 (cleaned up). The majority relies on Bartley's testimony concerning how tightly Officer Blackman handcuffed him, Officer Blackman's refusal to loosen the handcuffs, and the red marks and bruises that Bartley sustained to his wrist in finding that Officer Blackman's use of force was done with an intent to injure.

¶ 48 The majority cites federal cases from the Third and Sixth Circuits recognizing the general proposition that excessively tight or forceful handcuffing, particularly handcuffing that results in physical injury, constitutes excessive force. Fourth Circuit cases tend to support the opposite conclusion. For example, in *Carter v. Morris*, the Fourth Circuit held that the plaintiff's allegation that her handcuffs were too tight would not support an excessive force claim. 164 F.3d 215, 219 n.3 (4th Cir. 1999). Additionally, in *Cooper v. City of Virginia Beach*, the Fourth Circuit affirmed an award of qualified immunity at the summary judgment stage in an excessive force claim based on unduly tight handcuffing. 817 F. Supp. 1310, 1319 (E.D. Va. 1993), *aff'd*, 21 F.3d 421 (4th Cir. 1994). In *Cooper*, the record indicated that the plaintiff was allegedly handcuffed so tightly that his hands grew numb. *Id.* The court found the excessive force claim deficient because the plaintiff failed to offer sufficient evidence of actual injury. *Id.* Notably, the court also stressed that the handcuffing in and of itself was not unreasonable, particularly in light of the plaintiff's apparent intoxication. *Id.*

¶ 49 Officer Blackman testified that Mr. Bartley's behavior was threatening and alarming, and Officer Blackman felt like he was in danger and believed that handcuffing Mr. Bartley "was the safest for both of [them]." Bartley alleged he suffered some purported redness to his wrists from the tightness of the handcuffs. One must strain to observe the purported injury in the exhibits contained in the record. Nonetheless, Bartley admitted he received no medical treatment and had no sensitivity, strange feeling, nerve damage, tingling, or lack of use of his wrists. Bartley could not even remember if the alleged redness on his wrists lasted until the next day.

¶ 50 Finally, as evidence of actual intent, the majority cites Bartley's testimony that Officer Blackman made the comment that if Bartley had done as he was instructed, he would not be in "this situation." The majority also cites the fact that Mr. Bartley remained handcuffed for at least twenty minutes in front of neighbors as evidence of retaliation.

¶ 51 This is not the "competent and substantial evidence" that plaintiff needs to overcome his heavy burden. Officers routinely make remarks to inform individuals why they have been placed into handcuffs or in the patrol vehicle. An officer acting in accordance with his training would attempt to deescalate the situation by explaining to an individual who refused to follow commands that his or her actions are the reason for their situation. It certainly is an accurate statement that had Bartley simply complied with the officer's instructions he would not have been handcuffed and arrested. At any rate, this statement is not evidence of "retaliation" and it is not sufficient for plaintiff to overcome his heavy burden.[1]

¶ 52 Bartley has not produced "competent and substantial evidence" necessary to carry his "heavy burden" to forecast specific facts constituting malice, and Officer Blackman is entitled to judgment as a matter of law. To hold otherwise would effectively eliminate public official immunity for law enforcement officers and expose them to personal liability for every encounter in which an arrest is made. Unfortunately, the majority does just that, and being a law enforcement officer in North Carolina just became even more challenging.

Chief Justice NEWBY and Justice BARRINGER join in this dissenting opinion.

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1. It is also worth noting that Officer Blackman took the time to turn the ignition of Bartley's car on so that Bartley's cat, which was in the back of his vehicle, would not overheat during the encounter. This further negates any notion that Officer Blackman was acting with malice.

BELMONT ASSOCIATION, INC.
v.
THOMAS FARWIG AND WIFE, RANA FARWIG AND NANCY MAINARD

No. 214A21

Filed 17 June 2022

Real Property—covenants—restrictive—solar panel installation —denial of application—N.C.G.S. § 22B-20

The denial by an architectural review committee (ARC) of defendant property owners' application to install solar panels on the roof of their house violated the plain and unambiguous meaning of N.C.G.S. § 22B-20, which generally prohibits restrictions on solar collectors unless either one of two exceptions is met. In this case, where the subdivision's declaration of covenants did not expressly prohibit solar panels or mention solar panels at all, but still could have had the effect of restricting their installation (by granting authority to the ARC to refuse any improvements for aesthetic reasons), the committee's restriction was void under the statute's general prohibition in subsection (b). Since the restriction prevented the reasonable use of solar panels, the exception in subsection (c) did not apply, and since there was no express restriction of solar panels, the exception in subsection (d) regarding installations visible from the ground did not apply. Defendants were therefore entitled to summary judgment on their claim for declaratory judgment.

Justice MORGAN dissenting.

Justice BERGER dissenting.

Chief Justice NEWBY joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 277 N.C. App. 387 (2021), affirming an order entered on 3 January 2020 by Judge Graham Shirley in Superior Court, Wake County. Heard in the Supreme Court on 23 March 2022.

Jordan Price Wall Gray Jones & Carlton, PLLC, by Brian S. Edlin, Hope Derby Carmichael, and Mollie L. Cozart, for plaintiff-appellee.

Thurman, Wilson, Boutwell & Galvin, P.A., by James P. Galvin, for defendant-appellants.

Joshua H. Stein, Attorney General, by Ryan Y. Park, Solicitor General, and Nicholas S. Brod, Assistant Solicitor General, for the State of North Carolina, amicus curiae.

Southern Environmental Law Center, by Nicholas Jimenez and Lauren J. Bowen, for North Carolina Sustainable Energy Association, amicus curiae.

J. Ronald Jones Jr. and Bettie Kelley Sousa for Solar Industry Businesses, amicus curiae.

Law Firm Carolinas, by Harmony W. Taylor, for Community Associations Institute – North Carolina Chapter, Inc., amicus curiae.

HUDSON, Justice.

¶ 1 Thomas and Rana Farwig and Nancy Mainard (together, the Farwigs or defendants) appeal as of right based upon a dissent from a decision of the Court of Appeals, in which the majority affirmed the trial court's grant of summary judgment to plaintiff Belmont Association, Inc. (Belmont). The Court of Appeals below affirmed the grant of summary judgment to Belmont. On appeal, defendants argue the Court of Appeals erred in its interpretation of N.C.G.S. § 22B-20. We agree, reverse the decision of the Court of Appeals, and remand for further remand to the trial court for entry of summary judgment for defendants on the declaratory judgment claim and for further proceedings not inconsistent with this opinion.

I. Factual and Procedural Background

¶ 2 On 9 December 2011, developers recorded the Declaration of Protective Covenants for Belmont at Deed Book 14571, page 2528 in the Wake County Public Registry. Belmont Association was organized to administer and enforce the covenants and restrictions under the Declaration, and all covenants and restrictions contained in the Declaration run with the land of all residential units in the Belmont subdivision.

¶ 3 The Declaration, among other things, contained various restrictions on the use of property within Belmont. Although many specific uses of property were restricted by Article IX of the Declaration, including "animals," "home businesses," restrictions on "leases," "temporary structures," and "wetlands, conservation areas, and buffers," the use of residential solar panels was not specifically mentioned anywhere in the Declaration.

¶ 4 Nevertheless, Article XI of the Declaration establishes an "Architectural Review Committee" (ARC) and describes its functions. Section 3(a) of Article XI provides:

> The [ARC] shall have the right to refuse to approve any Plans for improvements which are not, in its sole discretion, suitable or desirable for the Properties, including for any of the following: (i) lack of harmony of external design with surrounding structures and environment; and (ii) aesthetic reasons. Each Owner acknowledges that determinations as to such matters may be subjective and opinions may vary as to the desirability and/or attractiveness of particular improvements.

¶ 5 On or about 17 December 2012, defendants purchased Lot 42, located at 4123 Davis Meadow Street, Raleigh, North Carolina, in the Belmont subdivision. Lot 42 is one of the properties subject to the Declaration.

¶ 6 On or about 5 February 2018, defendants installed solar panels on the roof of their house on Lot 42 at a cost of over $32,000. Five months later, the ARC sent defendants a notice of architectural violation and asked defendants to submit an architectural request form to the ARC. Defendants submitted the architectural request form on 20 July 2018 seeking approval of the solar panels along with a petition to allow solar panels on the front portion of the roof of homes in Belmont that was signed by twenty-two residents. The documentation noted that solar panels must face southward to be effective.

¶ 7 On 5 September 2018, Belmont denied defendants' application. While acknowledging the Declaration did not specifically address solar panels, Belmont cited "aesthetic" problems as the reason for its denial. It further stated that "the proposed location of the panels were not consistent with the plan and scheme of development in Belmont." Belmont suggested defendants could move the solar panels to a part of the house not visible from the road, but defendants responded that moving the solar panels would significantly reduce the energy generated by the panels and a shade report showed the location of the panels received the most light.

¶ 8 On 4 October 2018, defendants appealed the ARC's denial of their architectural request form. On 2 November 2018, Belmont denied defendants' appeal. Belmont demanded defendants remove the solar panels by 7 December 2018. The solar panels were not removed by that date and Belmont subsequently sent a notice of hearing. Following a

30 January 2019 hearing, at which Thomas Farwig presented a defense of defendants' actions, Belmont voted to impose a fine of $50 per day after 1 March 2019 if the solar panels were not removed. Belmont began imposing fines on defendants on or about 8 March 2019, and defendants began paying the fines to avoid foreclosure.

¶ 9 On 1 April 2019, Belmont filed a Claim of Lien on Lot 42, alleging a debt of $50.00. The next day, Belmont filed its complaint seeking injunctive relief and the collection of fines imposed. On 7 June 2019, defendants filed an answer, motion to dismiss, and counterclaims against Belmont for declaratory judgment, breach of contract, breach of the implied covenant of good faith and fair dealing, slander of title, and violation of N.C.G.S. § 75-1.1 *et seq*. Belmont filed a motion to dismiss, motion for judgment on the pleadings, and reply to defendants' counterclaims. Belmont filed a motion for summary judgment on 5 November 2019 following discovery.

¶ 10 After a hearing on 11 December 2019, the Superior Court, Wake County, Judge Graham Shirley presiding, granted in part Belmont's motion for summary judgment as to Belmont's first claim for injunctive relief and defendants' first counterclaim for declaratory judgment. The trial court issued its order on 3 January 2020, in which it ruled that N.C.G.S. § 22B-20(d) applied to the action; that "this action involves a deed restriction, covenant, or similar binding agreement that runs with the land that would prohibit the location of solar collectors as described in N.C.G.S. § 22B-20(b) that are visible by a person on the ground on a roof surface that slopes downward toward the same areas open to common or public access that the façade of the structure faces"; and that N.C.G.S. § 22B-20(c) is not applicable "because subsection (d) is applicable." Defendants appealed the trial court's order granting Belmont's motion for summary judgment to the Court of Appeals.

¶ 11 On appeal to the Court of Appeals, defendants argued the trial court erred in concluding that N.C.G.S. § 22B-20(d) applied because the Declaration did not expressly cover solar panels and, furthermore, that it erred in concluding the Declaration as applied was not void under N.C.G.S. § 22B-20(b).

¶ 12 In a divided opinion authored by Judge Gore, the Court of Appeals affirmed the trial court's order granting in part summary judgment to Belmont. The majority held that "[s]ubsection (d) of N.C.[G.S.] § 22B-20 is applicable in this action because the Declaration has the effect of prohibiting the installation of solar panels '[o]n a roof surface that slopes downward toward the same areas open to common or public access

that the façade of the structure faces.' " *Belmont Ass'n v. Farwig*, 277 N.C. App. 387, 2021-NCCOA-207, ¶ 21 (third alteration in original). Judge Jackson dissented from the majority opinion, arguing that the majority's holding "ignores precisely what the statutory ban forbids" by misconstruing a restriction that effectively prohibits the installation of solar panels even if it does not do so expressly. *Id.* ¶ 22 (Jackson, J., dissenting).

¶ 13 Defendants timely appealed to this Court under N.C.G.S. § 7A-30 on the basis of the dissenting opinion.

II. Analysis

¶ 14 On appeal, defendants argue the Court of Appeals erred in its interpretation of N.C.G.S. § 22B-20 in two ways. First, they argue the Court of Appeals erred in its application of N.C.G.S. § 22B-20(b) by failing to invalidate restrictions that effectively prohibit the installation of solar panels. Second, they argue the Court of Appeals erred in its application of N.C.G.S. § 22B-20(d) by failing to require an existing "deed restriction, covenant, or similar binding agreement" that affirmatively seeks to regulate solar panels in order for plaintiff to avail itself of the exception therein. We agree and reverse the decision of the Court of Appeals affirming the trial court's order granting summary judgment to Belmont.

¶ 15 "Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573 (2008) (cleaned up); *see* N.C.G.S. § 1A-1, Rule 56(c) (2021). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Dalton v. Camp*, 353 N.C. 647, 651 (2001). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337 (2009) (cleaned up).

¶ 16 This case presents a question of statutory interpretation of first impression. "Statutory interpretation properly begins with an examination of the plain words of the statute." *Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144 (1992). "If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning." *State v. Beck*, 359 N.C. 611, 614 (2005). "However, where the statute is ambiguous or unclear as to its meaning, the courts must interpret the statute to give effect to the legislative intent. Canons of statutory interpretation are only employed if the language of the statute is ambiguous or lacks precision, or is fairly susceptible

of two or more meanings." *JVC Enters., LLC v. City of Concord*, 376 N.C. 782, 2021-NCSC-14, ¶ 10 (cleaned up).

¶ 17 Section 22B-20 provides as follows:

> (b) Except as provided in subsection (d) of this section, any deed restriction, covenant, or similar binding agreement that runs with the land that would prohibit, or have the effect of prohibiting, the installation of a solar collector that gathers solar radiation as a substitute for traditional energy for water heating, active space heating and cooling, passive heating, or generating electricity for a residential property on land subject to the deed restriction, covenant, or agreement is void and unenforceable. As used in this section, the term "residential property" means property where the predominant use is for residential purposes. The term "residential property" does not include any condominium created under Chapter 47A or 47C of the General Statutes located in a multi-story building containing units having horizontal boundaries described in the declaration. As used in this section, the term "declaration" has the same meaning as in G.S. 47A-3 or G.S. 47-1-103, depending on the chapter of the General Statutes under which the condominium was created.
>
> (c) This section does not prohibit a deed restriction, covenant, or similar binding agreement that runs with the land that would regulate the location or screening of solar collectors as described in subsection (b) of this section, provided the deed restriction, covenant, or similar binding agreement does not have the effect of preventing the reasonable use of a solar collector for a residential property. . . .
>
> (d) This section does not prohibit a deed restriction, covenant, or similar binding agreement that runs with the land that would prohibit the location of solar collectors as described in subsection (b) of this section that are visible by a person on the ground:
>
> (1) On the façade of a structure that faces areas open to common or public access;

(2) On a roof surface that slopes downward toward the same areas open to common or public access that the façade of the structure faces; or

(3) Within the area set off by a line running across the façade of the structure extending to the property boundaries on either side of the façade, and those areas of common or public access faced by the structure.

N.C.G.S. § 22B-20 (2021).

¶ 18 First, defendants argue the Court of Appeals erred in its interpretation of N.C.G.S. § 22B-20(b). By its plain terms, N.C.G.S. § 22B-20(b) applies not just to "any deed restriction, covenant, or similar binding agreement that runs with the land that would prohibit . . . the installation of a solar collector" but also to "any deed restriction, covenant, or similar binding agreement that runs with the land that would . . . *have the effect of prohibiting*[ ] the installation of a solar collector." N.C.G.S. § 22B-20(b) (emphasis added). Based on the plain and unambiguous meaning of subsection (b), the ARC's restriction of the use of solar panels under provisions of Article XI of the Declaration is void unless there is some exception, because even though the Declaration does not *expressly* prohibit the installation solar panels, the provisions of Article XI of the Declaration which treat the installation of solar panels as an "improvement" subject to aesthetic regulation by the ARC *effectively* prohibit their installation. Accordingly, under N.C.G.S. § 22B-20(b), the restriction is prohibited unless there is some exception.

¶ 19 Subsection (c) provides one exception for a "deed restriction, covenant, or similar binding agreement [that] does not have the effect of preventing the reasonable use of a solar collector for a residential property." N.C.G.S. § 22B-20(c). Subsection (d) provides another exception, which permits a "deed restriction, covenant, or similar binding agreement that runs with the land that *would prohibit* the location of solar collectors as described in subsection (b) of this section that are visible by a person on the ground" subject to certain restrictions. N.C.G.S. § 22B-20(d) (emphasis added). By its plain terms, subsection (d) applies only to such restrictions "that *would prohibit*" solar panels as described in subsection (b).

¶ 20 Here, the restriction at issue prevents the reasonable use of solar panels, and accordingly, the exception contained in subsection (c) would not apply. Subsection (d) also does not apply here because while

it provides an exception to subsection (b) allowing restrictions to prevent the installation of solar panels in certain locations, that subsection applies only to restrictions "that would prohibit" the installation of solar panels. The language describing restrictions that "have the effect" of prohibiting such installation in subsections (b) and (c) is not contained in subsection (d). Nevertheless, the Court of Appeals treats this plain language as ambiguous and proceeds to read subsection (d) to apply also to restrictions that have such an effect even though this language is not contained therein. *Belmont Ass'n*, ¶¶ 15–20. The Court of Appeals reaches this conclusion by looking not only to the text of the statute but also to the title of the legislation and the legislative history. *Id.* ¶¶ 16–17. In so doing, the Court of Appeals contravenes our rules of statutory interpretation by applying canons of construction where the plain meaning of the statute is clear. It is a bedrock rule of statutory interpretation that "[i]f the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning." *Beck*, 359 N.C. at 614. Accordingly, the Court of Appeals erred in declining to give the words of subsection (d) their plain and definite meaning and by reading the subsection to apply also to restrictions that "have the effect" of prohibiting the installation of solar panels based on sources outside the text. The Court of Appeals necessarily also erred in concluding that the restriction at issue here satisfies subsection (d), because as previously noted, the Declaration does not expressly prohibit the installation of solar panels in any manner.

III. Conclusion

¶ 21 We conclude the Court of Appeals erred in affirming the order granting summary judgment in part to Belmont on the basis that the restrictions at issue, which do not expressly prohibit the installation of solar panels but only have the effect of doing so as applied by the ARC, fall under the safe harbor exception contained in N.C.G.S. § 22B-20(d). We hold that the restriction at issue here does have the effect of prohibiting the installation of solar panels and the reasonable use of solar panels and, accordingly, the exception contained in subsection (c) of the statute does not apply. Since neither statutory exception applies, we hold the restriction violates N.C.G.S. § 22B-(20)(b). Accordingly, defendants are entitled to summary judgment on the declaratory judgment claim. We reverse the decision of the Court of Appeals with instructions to remand to the trial court for further proceedings not inconsistent with this decision.

REVERSED AND REMANDED.

Justice MORGAN dissenting.

¶ 22 While I agree with the recognition and recitation by my learned colleagues in the majority of the pertinent provisions that govern the principles of statutory construction which are germane to this case, I disagree with the majority's application of these established guidelines of interpretation to the facts and circumstances existent here. The manner in which these interpretative directives were employed in the present case has led, in my view, to an erroneous outcome. I would affirm the decision of the Court of Appeals majority that the trial court properly granted summary judgment in favor of plaintiff Belmont Association, Inc.

¶ 23 As cited by the Court's majority, the salient clause of the Belmont residential subdivision's Declaration of Protective Covenants is the authorization for the subdivision's Architectural Review Committee to

> have the right to refuse to approve any Plans for improvements which are not, in its sole discretion, suitable or desirable for the Properties, including for any of the following: (i) lack of harmony of external design with surrounding structures and environment; and (ii) aesthetic reasons. Each Owner acknowledges that determinations as to such matters may be subjective and opinions may vary as to the desirability and/or attractiveness of particular improvements.

This Court has been beckoned to consider the Committee's authorization in light of N.C.G.S. § 22B-20 and its governance of protective covenants as they purport to regulate the installation of solar panels.

¶ 24 In interpreting a statute, the Court must first ascertain the legislative intent in enacting the legislation. The first consideration in determining legislative intent is the words chosen by the Legislature. When the words are clear and unambiguous, they are to be given their plain and ordinary meanings. *O & M Indus. v. Smith Eng'g Co.*, 360 N.C. 263, 267–68 (2006). "The goal of statutory interpretation is to determine the meaning that the [L]egislature intended upon the statute's enactment." *State v. Rankin*, 371 N.C. 885, 889 (2018).

¶ 25 The intent of the legislative body which enacted N.C.G.S. § 22B-20 is expressly stated in the first passage of the statute, and is contained in the law's subsection (a):

> The intent of the General Assembly is to protect the public health, safety, and welfare by encouraging

> the development and use of solar resources and by prohibiting deed restrictions, covenants, and other similar agreements that could have the ultimate effect of driving the costs of owning and maintaining a residence beyond the financial means of most owners.

N.C.G.S. § 22B-20(a) (2021).

¶ 26 In determining legislative intent, the words and phrases of a statute must be interpreted contextually, in a manner which harmonizes with the other provisions of the statute and which gives effect to the reason and purpose of the statute. *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 215 (1990). "All parts of the same statute dealing with the same subject are to be construed together as a whole, and every part thereof must be given effect if this can be done by any fair and reasonable interpretation." *State v. Tew*, 326 N.C. 732, 739 (1990).

¶ 27 Guided by these admonitions of proper statutory construction regarding the requirement that all of the provisions of N.C.G.S. § 22B-20 are to be reconciled with one another in order to maintain the sanctity of the statute while guided by the Legislature's clear intent embodied in the law's subsection (a), the next subsection of the statute—N.C.G.S. § 22B-20(b)—*immediately* begins with a deferential reference to N.C.G.S. § 22B-20(d). Subsection 22B-20(b) states the following, in pertinent part:

> *Except as provided in subsection (d) of this section*, any deed restriction, covenant, or similar binding agreement that runs with the land that would prohibit, or have the effect of prohibiting, the installation of a solar collector that gathers solar radiation as a substitute for traditional energy for water heating, active space heating and cooling, passive heating, or generating electricity for a residential property on land subject to the deed restriction, covenant, or agreement is void and unenforceable.

N.C.G.S. § 22B-20(b) (emphasis added).

¶ 28 In ascribing the plain and ordinary meaning to the phrase "[e]xcept as provided in subsection (d) of this section," as these words are individually selected and collectively joined by the General Assembly in this introductory passage of N.C.G.S. § 22B-20(b), this prelude to the substance of subsection (b) explicitly notes that the content of N.C.G.S. § 22B-20(b) yields to the operation of N.C.G.S. § 22B-20(d) to the extent

that N.C.G.S. § 22B-20(b) contains conflicting or differing content in an area also addressed by N.C.G.S. § 22B-20(d). Such conflict and difference would then be resolved by the subservience of subsection (b) to subsection (d) in the given area, and subsection (d) would control. Otherwise, if there is no subject area of conflict or difference between N.C.G.S. § 22B-20(b) and N.C.G.S. § 22B-20(d), then the provisions of N.C.G.S. § 22B-20(b) stand alone and are operative.

¶ 29 Before determining if, and to what extent, there is any incompatibility between N.C.G.S. § 22B-20(b) and N.C.G.S. § 22B-20(d), the intervening subsection of (c) must be consulted after subsection (b) and before subsection (d), since the Legislature has constructed the statutory enactment in the manner that the Legislature deemed appropriate. Reading the five subsections of N.C.G.S. § 22B-20[1] in sequential order comports with the aforementioned dictate of *Burgess*, that the words and phrases of a statute must be interpreted contextually. In pertinent part, N.C.G.S. § 22B-20(c) reads:

> This section does not prohibit a deed restriction, covenant, or similar binding agreement that runs with the land that would regulate the location or screening of solar collections as described in subsection (b) of this section, provided the deed restriction, covenant, or similar binding agreement does not have the effect of preventing the reasonable use of a solar collector for a residential property. If an owners' association is responsible for exterior maintenance of a structure containing individual residences, a deed restriction, covenant, or similar binding agreement that runs with the land may provide that (i) the title owner of the residence shall be responsible for all damages caused by the installation, existence, or removal of solar collectors; (ii) the title owner of the residence shall hold harmless and indemnify the owners' association for any damages caused by the installation, existence, or removal of solar collectors; and (iii) the owners' association shall not be responsible for maintenance, repair, replacement, or removal of solar collectors unless expressly agreed in a written agreement that is recorded in the office of the register of deeds in the county or counties in which the property is situated.

1. Subsection 22B-20(e) addresses the "award [of] costs and reasonable attorneys' fees to the prevailing party" and is irrelevant to the dissent's analysis.

N.C.G.S. § 22B-20(c). Subsection 22B-20(c), while expressly stating that it does not prohibit covenants such as those mentioned in Belmont's Declaration which plaintiff could choose to apply in order to "regulate the location or screening of solar collectors as described in subsection (b)," nonetheless could ban the operation of the covenant if it would "have the effect of preventing the reasonable use of a solar collector for a residential property." *Id.* On its face, the Declaration's covenant language does not operate to this extent, and the majority recognizes in its written opinion that this exception contained in N.C.G.S. § 22B-20(c) does not apply in the instant case. Hence, N.C.G.S. § 22B-20(c) does not impact this case with respect to defendants' installation of solar panels.

¶ 30 Subsection 22B-20(d), which preempts the operation of N.C.G.S. § 22B-20(b) to the extent that subsection (b) and subsection (d) are incompatible with one another due to conflicting or differing content in light of the plain and ordinary meanings of the introductory words of N.C.G.S. § 22B-20(b), "Except as provided in subsection (d) of this section," which render N.C.G.S. § 22B-20(b) subservient to N.C.G.S. § 22B-20(d) as described, is composed entirely of the following provisions:

> This section does not prohibit a deed restriction, covenant, or similar binding agreement that runs with the land that would prohibit the location of solar collectors as described in subsection (b) of this section that are visible by a person on the ground:
>
> (1) On the façade of a structure that faces areas open to common or public access;
>
> (2) On a roof surface that slopes downward toward the same areas open to common or public access that the façade of the structure faces; or
>
> (3) Within the area set off by a line running across the façade of the structure extending to the property boundaries on either side of the façade, and those areas of common or public access faced by the structure.

N.C.G.S. § 22B-20(d). Although under N.C.G.S. § 22B-20(b), a covenant such as the one at issue in the current case which plaintiff could deem to apply to the installation of solar panels in plaintiff's potential interpretation of the Declaration would be "void and unenforceable" because subsection (b) does not allow any such covenant to operate "that would

prohibit, or have the effect of prohibiting, the installation of" solar panels as performed by defendants in the present case. Subsection 22B-20(d), however, "does not prohibit" the operation of a covenant "that would prohibit the location of solar collectors *as described in subsection (b) of this section* that are visible by a person on the ground: (1) On the façade of a structure that faces areas open to common or public access; [or] (2) On a roof surface that slopes downward toward the same areas open to common or public access that the façade of the structure faces." N.C.G.S. § 22B-20(d) (emphasis added).

¶ 31 In giving the clear and unambiguous words of N.C.G.S. § 22B-20 their plain and ordinary meanings as this Court has directed in *O & M Industries*, I conclude that the principles of statutory construction support plaintiff's determination to deny defendants' application to install solar panels on their residential home, in plaintiff's words, "because the installation can be seen from the road in front of the home, and is not able to be shielded," with said justification being grounded in two places in N.C.G.S. § 22B-20 where the guidelines governing statutory interpretation are readily exercised: (1) the introductory clause of N.C.G.S. § 22B-20(b)—"Except as provided in subsection (d) of this section"—which establishes in clear and unambiguous words that subsection (b) yields to the operation of N.C.G.S. § 22B-20(d) to the extent that N.C.G.S. § 22B-20(b) contains conflicting or differing content in an area also addressed by N.C.G.S. § 22B-20(d), wherein subsection (d) would then supersede subsection (b) and thus subsection (d) would then control the outcome of the issue; and (2) the sole sentence of N.C.G.S. § 22B-20(d) which begins, "This section does not prohibit a deed restriction, covenant, or similar binding agreement that runs with the land that would prohibit the location of solar collectors as described in subsection (b) of this section that are visible by a person on the ground," and which establishes in clear and unambiguous words that restrictions on the placement of solar panels which are generally disallowed by subsection (b) are authorized by subsection (d) to be allowed in circumstances where, as in the present case, the placement of the solar panels causes them to be visible from ground level from the façade of a structure that faces areas open to common or public access, or on a roof surface that slopes downward toward the same areas which are open to common or public access that the façade of the structure faces. Here, plaintiff denied defendants' application for the installation of solar panels because plaintiff determined that "the installation can be seen from the road in front of the home, and is not able to be shielded." There is evidence in the record that defendants placed the solar panels at issue on the front area of their home's roof which sloped southward and

was visible from the street in front of the home. As I see it, N.C.G.S. § 22B-20(d), which supersedes N.C.G.S. § 22B-20(b) in this aspect of the statute, therefore lawfully empowered plaintiff to deny defendants' application to install the solar panels.

¶ 32 From my perspective, the application of the well-settled principles of statutory interpretation to N.C.G.S. § 22B-20 readily shows that plaintiff had the authority to deny defendants' application. This implementation of standard statutory construction would not thwart the intent of the General Assembly which undergirds the statute and which was expressed in N.C.G.S. § 22B-20(a), because the interaction between and among the various subsections of the law operates to eradicate any pervasive or arbitrary prohibitions of the development and use of solar resources by limiting the availability of deed restrictions, covenants, and other similar agreements that could have the ultimate effect of driving the costs of owning and maintaining a residence beyond the financial means of most owners.

¶ 33 Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2021). "A ruling on a motion for summary judgment must consider the evidence in the light most favorable to the non-movant, drawing all inferences in the non-movant's favor. The standard of review of an appeal from summary judgment is de novo." *Morrell v. Hardin Creek, Inc.*, 371 N.C. 672, 680 (2018) (citation omitted).

¶ 34 While I agree with the majority that summary judgment is the proper disposition of this case, I would render it in favor of plaintiff instead of defendants. Therefore, I would affirm the determination of the Court of Appeals in this case that the trial court correctly granted summary judgment for plaintiff.

Justice BERGER dissenting.

¶ 35 There is a predictable and certain outcome for this case provided the rules of statutory construction, as enunciated by the majority, are followed. Because a decision of the Architectural Review Committee is not a "deed restriction, covenant, or similar binding agreement" under N.C.G.S. § 22B-20, I respectfully dissent.

¶ 36 The facts and law of this case are not complicated. Defendants purchased a lot in a subdivision which was subject to the Declaration

of Protective Covenants for Belmont properly recorded with the Wake County Register of Deeds. The Declaration established an Architectural Review Committee (ARC). Pursuant to the Declaration, homeowners were required to request and obtain approval for improvements to their properties from the ARC prior to making any such improvements.

¶ 37 A little over five years after purchasing the property, defendants installed solar panels on the roof of their house without submitting a request to, or obtaining approval from, the ARC. The ARC responded by sending defendants a notice of violation. Ultimately, the ARC rejected defendants' untimely request but gave defendants the option to relocate the solar panels to a part of the house not visible from the road. Defendants refused and this action followed.

¶ 38 Defendants argue plaintiff's denial of their request to install solar panels violated N.C.G.S. § 22B-20, entitled "Deed restrictions and other agreements prohibiting solar collectors." Pursuant to that section,

> (b) Except as provided in subsection (d) of this section, any deed restriction, covenant, or similar binding agreement that runs with the land that would prohibit, or have the effect of prohibiting, the installation of a solar collector that gathers solar radiation as a substitute for traditional energy for water heating, active space heating and cooling, passive heating, or generating electricity for a residential property on land subject to the deed restriction, covenant, or agreement is void and unenforceable. . . .
>
> (c) This section does not prohibit a deed restriction, covenant, or similar binding agreement that runs with the land that would regulate the location or screening of solar collectors as described in subsection (b) of this section, provided the deed restriction, covenant, or similar binding agreement does not have the effect of preventing the reasonable use of a solar collector for a residential property. . . .
>
> (d) This section does not prohibit a deed restriction, covenant, or similar binding agreement that runs with the land that would prohibit the location of solar collectors as described in subsection (b) of this section that are visible by a person on the ground:
>
> (1) On the façade of a structure that faces areas open to common or public access;

(2) On a roof surface that slopes downward toward the same areas open to common or public access that the façade of the structure faces; or

(3) Within the area set off by a line running across the façade of the structure extending to the property boundaries on either side of the façade, and those areas of common or public access faced by the structure.

N.C.G.S. § 22B-20(b)–(d) (2021).

¶ 39 By its plain language, the statute prohibits "any deed restriction, covenant, or similar binding agreement that runs with the land that would prohibit, or have the effect of prohibiting, the installation of a solar collector." N.C.G.S. § 22B-20(b). It is uncontested that defendants' lot was subject to the Declaration described above. The Declaration is the only document in the record that would contain any such "deed restriction, covenant, or similar binding agreement." As the majority notes, "the use of residential solar panels was not specifically mentioned anywhere in the Declaration." The majority further acknowledges that "the Declaration does not expressly prohibit the installation of solar panels in any manner." Thus, there is no restriction set forth in the Declaration that prohibits or would have the effect of prohibiting the installation of solar panels that is at play in this scenario. Rather, it was the decision of the ARC that prohibited the installation of the solar panels by defendants.

¶ 40 A deed restriction, or "restrictive covenant," is defined as "[a] private agreement . . . in a deed . . . that restricts the use or occupancy of real property, esp. by specifying lot sizes, building lines, architectural styles, and the uses to which the property may be put." *Restrictive Covenant*, *Black's Law Dictionary* (11th ed. 2019). Further, the term "covenant" is "[a] formal agreement or promise . . . in a contract or deed, to do or not do a particular act; a compact or stipulation." *Covenant*, *Black's Law Dictionary* (11th ed. 2019). And a "covenant running with the land" is "[a] covenant intimately and inherently involved with the land and therefore binding subsequent owners and successor grantees indefinitely." *Covenant Running with the Land*, *Black's Law Dictionary* (11th ed. 2019).

¶ 41 A decision by the ARC is not a deed restriction, as it is not an agreement found in defendants' deed; is not a covenant, as it is not an agreement or promise found in a contract or deed; and is not

an agreement that runs with the land, as it does not bind subsequent owners and successor grantees indefinitely. Indeed, counsel for defendants conceded at oral argument that a decision by the ARC does not qualify as a deed restriction, covenant, or similar binding agreement.

¶ 42 However, the majority, citing no authority and acknowledging that the language of the statute is "plain and unambiguous," simply concludes that the decision of the ARC "*ha[s] the effect of prohibiting*[ ] the installation of a solar collector." The majority claims, in spite of counsel's concession, that "the provisions of . . . the Declaration which treat the installation of solar panels as an 'improvement' subject to aesthetic regulation by the ARC *effectively* prohibit their installation." This approach, however, ignores the fact that the ARC has the "sole discretion" to approve or reject any requested improvement. Stated another way, the establishment of the ARC does not effectively preclude any improvement, it merely enables a group of individuals to make decisions on "the desirability and/or attractiveness of particular improvements."

¶ 43 The majority looks solely to the effect of the ARC's decision, not the source of the restriction, and in so doing, ignores the plain language of N.C.G.S. § 22B-20.

¶ 44 However, even assuming the action by the ARC is covered under subsection (b) in that it "ha[s] the effect of" prohibiting the installation of solar collectors, the majority errs in concluding that subsection (d) does not apply. Here the trial court found that the solar collectors on defendants' property "are visible by a person on the ground on a roof surface that slopes downward toward the same areas open to common or public access that the façade of the structure faces." Therefore, as noted by Justice Morgan in his dissenting opinion, subsection (d) applies so long as the relevant deed restriction or covenant "would prohibit the location of solar collectors as described in subsection (b)." N.C.G.S. § 22B-20(d).

¶ 45 According to the majority, the "deed restriction, covenant, or similar binding agreement" in this case is "the ARC's restriction of the use of solar panels under provisions of Article XI of the Declaration." Based upon the majority's own characterization, the ARC's decision certainly "would prohibit the location of solar collectors" within the meaning of subsection (d) since it did in fact prohibit defendants from placing solar panels on the street-facing side of their roof. In other words, if the majority believes that the ARC's *decision* constitutes a "deed restriction, covenant, or similar binding agreement" under subsection (b), then logically it must also conclude that the decision falls under subsection (d)'s exception.

¶ 46 Despite the majority's overbroad reading of subsection (b), it narrowly reads subsection (d). It appears to limit the application of subsection (d) to situations where a deed restriction, covenant, or similar binding agreement contains express language prohibiting the installation of solar collectors. Such a result clearly is not what the General Assembly intended. It is puzzling why the majority would interpret subsection (b) so broadly but subsection (d) so narrowly. A better reading of the plain language is that a restriction which falls under subsection (b) is not void if it meets one of the criteria enumerated in subsection (d).

¶ 47 Lastly, even if the majority's application of subsections (b) and (d) was correct, the appropriate remedy still would not be to grant summary judgment in defendants' favor. Rather, the case should be remanded to the trial court to determine whether subsection (c) applies. The trial court summarily concluded that "subsection (c) . . . is not applicable because subsection (d) is applicable." Thus, the trial court never found that the ARC's decision prevented "the reasonable use of a solar collector" under subsection (c). N.C.G.S. § 22B-20(c). This factual determination is for the trial court, not an appellate court. Therefore, this case should be remanded to the trial court to make this factual determination.

Chief Justice NEWBY joins in this dissenting opinion.

FUND HOLDER REPS., LLC v. N.C. DEP'T OF STATE TREASURER

[381 N.C. 324, 2022-NCSC-65]

FUND HOLDER REPORTS, LLC
v.
NORTH CAROLINA DEPARTMENT OF STATE TREASURER

No. 45A21

Filed 17 June 2022

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 275 N.C. App. 470, 854 S.E.2d 64 (2020), affirming an order entered on 26 November 2019 by Judge Vinston Rozier in Superior Court, Wake County. Heard in the Supreme Court on 9 May 2022.

Stam Law Firm, PLLC, by R. Daniel Gibson, for petitioner-appellant.

Joshua H. Stein, Attorney General, by Ryan Y. Park, Solicitor General, Marc X. Sneed, Special Deputy Attorney General, S. Luke Morgan, Fellow, Office of the General Counsel, and Samuel W. Magaram, Solicitor General Fellow, for respondent-appellee.

PER CURIAM.

AFFIRMED.

Justice MORGAN did not participate in the consideration or decision of this case.

IN RE A.A.

[381 N.C. 325, 2022-NCSC-66]

IN THE MATTER OF A.A.

No. 441A20

Filed 17 June 2022

1. Termination of Parental Rights—subject matter jurisdiction—standing—petition filed by stepmother—statutory requirements

A stepmother had standing to file a private termination of parental rights action against a child's mother pursuant to N.C.G.S. § 7B-1103(a)(5), thereby giving the trial court subject matter jurisdiction over the matter, where there was sufficient evidence that the child had resided with her stepmother continuously far in excess of the required statutory length of time immediately preceding the filing of the petition. The trial court was not required to make an explicit finding of fact establishing petitioner's standing, particularly where the mother did not raise the issue at the hearing.

2. Termination of Parental Rights—grounds for termination—abandonment—sufficiency of evidence and findings

The trial court properly terminated a mother's parental rights to her daughter based on abandonment (N.C.G.S. § 7B-1111(a)(7)) where clear, cogent, and convincing evidence showed that, during the relevant six-month period, the mother had no visitation or communication with the child; sent no gifts, cards, or clothing; did not inquire about the child's well-being; and was aware that her child support payments, which were garnished from her wages, went to the child's father, with whom the child did not reside, and were not used for the child's benefit.

3. Termination of Parental Rights—best interests of the child—guardian ad litem recommendation—no termination of other parent's rights

The trial court did not abuse its discretion by concluding that termination of a mother's parental rights to her daughter was in her daughter's best interest where the court made specific findings as to each criteria found in N.C.G.S. § 7B-1110(a) and was not bound by the guardian ad litem's report, in which termination was not recommended. Further, although the court terminated the mother's rights but not the father's, its decision was not arbitrary since the best interests determination focuses on the child and not on the equities between the parents.

Justice EARLS concurring.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) (2019) from an order entered on 12 August 2020 by Judge Marion Boone in District Court, Surry County. Heard in the Supreme Court on 5 October 2021.

James N. Freeman Jr. for petitioner-appellee.

No brief for appellee Guardian ad Litem.

Peter Wood for respondent-appellant mother.

MORGAN, Justice.

¶ 1 In this private termination of parental rights case, we consider issues of the trial court's subject matter jurisdiction and its substantive determinations in the proceeding. First, we address the question of whether petitioner, as the stepmother of the juvenile who is the focus of this matter, had standing to bring a private termination of parental rights action against respondent-mother, the child's biological mother. If we conclude that petitioner had standing to initiate the termination action, then we must additionally consider respondent-mother's arguments that the trial court erred (1) in finding that the ground of abandonment existed for termination of parental rights, and (2) in concluding that termination of respondent-mother's parental rights was in the child's best interests.

¶ 2 Upon careful review, we hold that petitioner satisfied the relevant statutory requirements to file a private petition for termination of parental rights. We further conclude that clear, cogent, and convincing evidence of abandonment, as defined in both statutory law and case law, was presented at the adjudication hearing to establish that this ground existed for the termination of respondent-mother's parental rights. Lastly, the trial court did not abuse its discretion in concluding that it was in the child's best interests to terminate the parental rights of respondent-mother. Accordingly, we affirm the trial court's order terminating respondent-mother's parental rights.

I. Factual Background and Procedural History

¶ 3 Respondent-mother gave birth to a daughter "Amy" on 5 August 2010.[1] Amy's father was granted primary custody of Amy in 2012. Petitioner

1. We employ a pseudonym for the juvenile to protect her privacy and for ease of reading.

and Amy's father became involved in a romantic relationship in October 2013, and petitioner, Amy's father, and Amy began residing together later in the year. On 30 April 2015, petitioner and Amy's father married each other; the couple had two children together: a son born in April 2015 and a daughter born in March 2017. Petitioner and Amy's father separated in October 2017 and became divorced on 14 January 2019.

¶ 4 On 31 May 2018, petitioner filed an action against respondent-mother and Amy's father in District Court, Surry County, seeking full custody of Amy. In the custody complaint, petitioner alleged that respondent-mother and Amy's father were incarcerated in the Surry County Jail at the time of the filing of the action and that Amy had continued to live with petitioner since petitioner's marriage to the father, even after petitioner and Amy's father separated. Petitioner further alleged the occurrence of two incidents of domestic violence by Amy's father toward petitioner in the presence of one or more of the children. Petitioner stated that after the father exercised visitation with Amy and one of Amy's half-siblings on 22 January 2018, petitioner and Amy's father had a verbal argument which resulted in a "physical outburst" by the father and his destruction of petitioner's kitchen table and chairs in the presence of their youngest child. Petitioner also described an altercation on 1 May 2018 between the father and their two biological children which transpired during a visit to a fast-food restaurant, leading petitioner to seek criminal charges against the father and to seek a domestic violence protective order. Amy's father was arrested later in the day after picking up Amy early from school and then, with Amy in his car, circling the domestic violence office in Surry County where petitioner was discussing the domestic violence incident at the fast-food restaurant which had occurred.

¶ 5 On 31 May 2018, petitioner was granted temporary legal and physical custody of Amy, and on 23 July 2018, petitioner was granted exclusive legal and physical custody of Amy upon the trial court's finding that respondent-mother and Amy's father had "acted contrary to their constitutionally protected status as biological parents." Respondent-mother was granted two hours of supervised visitation with Amy weekly. However, respondent-mother did not utilize the visitation with the juvenile which was available to her and had only one in-person visit with Amy over the course of the next eleven months. Although respondent-mother requested a visit with Amy on 6 August 2018—the day after Amy's birthday—respondent-mother was not punctual in her arrival for the visit at the location where petitioner and respondent-mother had agreed that the visit would occur, which was a local library. Respondent-mother also failed to attend a court-ordered custody mediation regarding Amy

in late September 2018. Respondent-mother did have a visit with Amy on 23 September 2018. On 25 September 2018, respondent-mother requested another visit with the child, but when petitioner asked respondent-mother to send a text message to petitioner during the following week in order to arrange details of the proposed visit, respondent-mother did not do so. The next contact which petitioner had with respondent-mother occurred on 12 May 2019, which was Mother's Day. On this occasion, respondent-mother sent the following text message to petitioner: "This is [respondent-mother]. Happy Mother's Day. Thank you for always loving mine and treating mine as your own."

¶ 6 On 13 May 2019, petitioner filed a private petition to terminate respondent-mother's parental rights to Amy, alleging willful abandonment of the minor child within the meaning of N.C.G.S. § 7B-1111(a)(7) as the grounds for termination. Petitioner alleged that respondent-mother did not exercise respondent-mother's visitation rights with Amy at any time after 23 September 2018, that respondent-mother also chose not to send Amy any gifts, cards, or other correspondence from this identified juncture, and that respondent-mother never attempted to communicate with Amy by telephone or any other means.

¶ 7 During the adjudication hearing which took place on 24 July 2020,[2] petitioner testified that she had heard nothing from respondent-mother for eight months after September 2018 until respondent-mother sent petitioner the aforementioned Mother's Day text message on 12 May 2019. On this occasion, however, respondent-mother did not ask to speak to Amy or inquire about Amy's wellbeing. Although respondent-mother had a mailing address for Amy and knew petitioner's telephone number, nonetheless Amy never received any cards, gifts, food, clothing, or other items from respondent-mother; respondent-mother never assisted with Amy's school, medical, or emotional needs; and in the handful of text messages that respondent-mother sent to petitioner—in August 2019, March 2020, April 2020, and May 2020—respondent-mother never requested a visit with Amy or asked to speak with the child after Amy's birthday on 5 August 2019. In her August 2019 birthday telephone call to Amy, respondent-mother told the juvenile that respondent-mother had gifts and a card for Amy and confirmed a mailing address with petitioner, but no such gifts or card were ever received.

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2. At the start of the adjudication hearing, petitioner's counsel asked the trial court "to take judicial notice at this time of the files . . . that were handed up before court began this morning . . . [a] child support file, custody files, and . . . a Domestic Violence Protective Order." Counsel for respondent-mother stated that respondent-mother had no objection to the trial court taking judicial notice of these court files.

¶ 8 Amy's father testified at the adjudication hearing that he did not believe that respondent-mother had any contact with Amy after September 2018 but acknowledged that his information was limited in light of the fact that he had been incarcerated for eighteen months out of the three years which preceded the adjudication hearing. The father also acknowledged that he had maintained control of the financial card onto which child support payments made by respondent-mother for the benefit of Amy were deposited and that he was using the funds himself which were deposited on the card, even though Amy had been in petitioner's sole custody for two years. Amy's father explained that while he was aware that the funds were intended for Amy's support, he believed that the State—not the father—had the responsibility to ensure that the child or her custodian was receiving the money which was paid for child support.

¶ 9 Respondent-mother testified that "at the end of 2018" she moved from Surry County, where Amy resided with petitioner, to Raleigh "to better [her] life." Respondent-mother related that she had been previously incarcerated on drug charges but represented that at the time of the adjudication hearing she had been "clean" for six months. Respondent-mother acknowledged that "[t]here isn't much of a relationship" between petitioner and her. When asked during her testimony why she had not tried to contact petitioner about Amy more than once after September 2018, respondent-mother replied, "Honestly, I just had just kind of given up at that point. And I didn't want to cause any more issue or drama or stress." Respondent-mother also testified that her wages had been garnished for six or seven years to provide child support for Amy, but respondent-mother admitted that she was aware that these funds were going to the father even though respondent-mother also knew that petitioner had obtained sole custody of Amy in 2018.

¶ 10 In a termination order filed on 12 August 2020, the trial court made findings of fact regarding, *inter alia*, the custody complaint filed by petitioner and the resulting award of custody, of which the trial court took judicial notice; respondent-mother's repeated failure to attend mediation sessions which were ordered as part of the custody proceedings; respondent-mother's failure to exercise visitation with Amy with the sole exception of a visit on 23 September 2018; respondent-mother's only telephone call to Amy after July 2018 which occurred on 6 August 2019; respondent-mother's failure to provide clothing, food, gifts, or involvement with Amy's school, counseling, or medical care; respondent-mother's awareness that her child support payments obtained through garnishment of her wages were actually going to the

father and not to petitioner as Amy's custodian for the care and support of the child; respondent-mother's choice to move her residence from Surry County to Raleigh, far from Amy's home; and respondent-mother's acknowledgment that she "basically gave up" with regard to contacting petitioner about Amy and was grateful to petitioner for loving Amy and "treating her like [petitioner's] own." Based upon these findings of fact, the trial court concluded that petitioner had proven "by clear, cogent, and convincing evidence that [r]espondent has abandoned the minor child within the meaning of North Carolina General Statute § 7B-1111(a)(7)."

¶ 11 The trial court then moved to the disposition stage and ultimately entered an order which included, *inter alia*, the following finding of fact addressing statutory considerations as specified in N.C.G.S. § 7B-1110(a):

> 2. The [trial c]ourt evaluated the evidence by the standard of the best interest of the minor child, and considered the statutory criteria located in [N.C.G.S.] § 7B-1110:
>
> a. Age of the juvenile: The minor child is almost ten years old.
>
> b. The likelihood of adoption of the juvenile: There is strong evidence that the minor child will be adopted by [p]etitioner.
>
> c. Whether termination will aid in a permanent plan: Adoption of the minor child by [p]etitioner would aid in a plan of adoption and provide permanence for the minor child.
>
> d. Bond between the juvenile and the parent: The [trial c]ourt finds that there is a familiarity between the minor child and the memory of her biological mother, but there is no bond as a mother and child.
>
> e. Quality of relationship between the child and the adoptive parent: The [trial c]ourt finds this relationship is very strong.
>
> f. Any other relevant consideration: The [trial c]ourt incorporates the findings of fact from the Adjudicatory hearing, and finds that [p]etitioner has been the minor child's mother for all intents and purposes.

The trial court then concluded that it was in the juvenile Amy's best interests to terminate respondent-mother's parental rights to the child. Respondent-mother entered written notice of appeal to this Court on 27 August 2020, and the matter was heard by this Court on 5 October 2021.

II. Analysis

¶ 12 Respondent-mother advances three arguments in her appeal to this Court: first, that petitioner did not establish that petitioner had standing to file a petition for termination of respondent-mother's parental rights to Amy; second, that the trial court erred in finding the existence of the ground of abandonment pursuant to N.C.G.S. § 7B-1111(a)(7) which provided the basis for the termination of respondent-mother's parental rights; and third, that the trial court abused its discretion in concluding that termination of the parental rights of respondent-mother was in the juvenile Amy's best interests where the guardian ad litem did not recommend termination and Amy did not wish for respondent-mother's parental rights to be terminated. As discussed below, we find each of respondent-mother's arguments to be unpersuasive, and as a result, this Court affirms the order terminating her parental rights.

A. Standing

¶ 13 **[1]** Respondent-mother contends that petitioner lacked standing to file a petition for the termination of respondent-mother's parental rights to the juvenile Amy. Respondent-mother claims that the termination of parental rights petition did not specifically allege that Amy had lived with petitioner for the two years immediately preceding the filing of the petition and that the trial court made no finding of fact in the termination of parental rights order about petitioner's standing to initiate the action or the duration of time that Amy had lived with petitioner. Respondent-mother also suggests that Amy might have lived with someone other than petitioner at some point during the relevant statutory time period. For these reasons, respondent-mother asserts that the trial court erred in allowing petitioner's termination of parental rights action to proceed. After thoughtful consideration of respondent-mother's arguments, the pertinent statutory law and case law, and the record in this case, we disagree with respondent-mother's position.

> "Whether or not a trial court possesses subject-matter jurisdiction is a question of law that is reviewed de novo. Challenges to a trial court's subject-matter jurisdiction may be raised at any stage of proceedings, including for the first time before this Court." *In re A.L.L.*, 376 N.C. 99, 101, 852 S.E.2d 1 (2020)

> (extraneity omitted). However, "[t]his Court presumes the trial court has properly exercised jurisdiction unless the party challenging jurisdiction meets its burden of showing otherwise." *In re L.T.*, 374 N.C. 567, 569, 843 S.E.2d 199 (2020).

In re M.R.J., 378 N.C. 648, 2021-NCSC-112, ¶ 19 (alteration in original). One issue that could implicate subject matter jurisdiction is the standing of a party to initiate a particular action. *Id.* ¶¶ 21, 41. On the matter of standing, the North Carolina Juvenile Code provides that "[a] petition or motion to terminate the parental rights of either or both parents to his, her, or their minor juvenile may only be filed by," *inter alia*, "[a]ny person with whom the juvenile has resided for a continuous period of two years or more next preceding the filing of the petition or motion." N.C.G.S. § 7B-1103(a) (2019).[3] Where challenged, "the record must contain evidence sufficient to sustain a finding [of standing]." *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 647 (2008); *see also In re L.T.*, 374 N.C. 567, 569 (2020).

¶ 14 In the petition for termination of parental rights, petitioner alleged that she and Amy's father "had primary legal and physical custody of" Amy "during their marriage," which the petition further alleged existed from 30 April 2015 to 14 January 2019. The petition alleged that Amy continued to reside with petitioner after the end of petitioner's marriage to the father and that the juvenile still resided with petitioner as of the 13 May 2019 date of the petition's filing. In the 31 May 2018 complaint seeking custody of Amy that petitioner filed against respondent-mother and the father, of which the trial court took judicial notice in its decision in the instant case, petitioner alleged that Amy had resided with petitioner since the separation of petitioner and the child's father in October 2017. These filings alone provide a sufficient foundation to support a determination that petitioner had standing to initiate the termination of parental rights action based upon the allegations of petitioner, and buttressed by the judicial notice of documentation by the trial court, that the juvenile Amy had resided with petitioner for a continuous period of two years or more next preceding the filing of petitioner's petition.

¶ 15 In addition to the allegations contained in the termination of parental rights petition and in the custody complaint, several trial court orders

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3. This subsection was amended, effective 1 October 2021, while applying to actions filed or pending on or after that date, to reduce the pertinent time period of the juvenile's residence with a petitioner from "two years" to "18 months." Act of Sept. 1, 2021, S.L. 2021-132, § 1(*l*), 2021 N.C. Sess. Laws 165, 170. Hence, the law, in its amended form, does not apply to the present case.

of which the trial court in this case took judicial notice and which are included in the record on appeal in this case also show that petitioner's allegations demonstrate her standing to bring this action. The custody order, which was filed on 23 July 2018 and issued by the same trial court in which the instant case was pending, awarded full custody of the juvenile Amy to petitioner; this custodial arrangement has continued since that date. That custody award, in turn, followed an order entered on 31 May 2018 in which petitioner was granted temporary legal and physical custody of Amy. These court orders established that petitioner had sole physical custody of Amy for at least one year of the pertinent two-year period preceding the filing of the termination petition, and the trial court orders corroborate the position of petitioner.

¶ 16 Furthermore, respondent-mother did not introduce *any* evidence at the adjudication hearing which suggested that the child Amy resided with anyone other than petitioner during the two years preceding the filing of the termination of parental rights petition. Indeed, there was no evidence presented by any party at the adjudication hearing, or otherwise introduced into the record, to suggest that Amy resided outside of petitioner's home at any point during the statutory time period. On appeal, respondent-mother does not cite any evidence which would support a determination by the trial court that petitioner lacked standing to file the petition for termination of parental rights and instead relies solely upon an argument that standing was not established due to the lack of express statements regarding the subject of standing in the termination order. To the contrary, petitioner testified that petitioner and Amy's father began living together in late 2013, along with Amy, who was three years old at the time and in the sole custody of her father.

¶ 17 In sum, the record in this case indicates that Amy continuously resided with petitioner—whether with or without the father—from at least late 2013 through 13 May 2019, the date on which the petition to terminate parental rights was filed. This period of more than five years not only encompasses but clearly exceeds the "continuous period of two years" preceding the filing of the petition as specified in the statute which defines those persons who have standing to file a petition for termination of parental rights. N.C.G.S. § 7B-1103(a)(5). Nothing in the Juvenile Code requires a petitioner to utilize any specific language in a petition for termination of parental rights to establish the party's standing to bring the termination proceeding. Similarly, no authority in the Juvenile Code or precedent from this Court requires the trial court to make a specific finding of fact regarding a petitioner's standing; therefore, it is of no consequence that the trial court did not elect to enter

an explicit recognition of petitioner's standing to initiate the case, especially since respondent-mother did not raise the issue during either the adjudication or the disposition hearing.

¶ 18 In light of the evidence of record in this matter, we conclude that petitioner had standing to file a petition for termination of respondent-mother's parental rights to Amy because Amy had been residing with petitioner "for a continuous period of two years or more next preceding the filing of the petition or motion." N.C.G.S. § 7B-1103(a)(5). Accordingly, respondent-mother's argument on this issue is unpersuasive.

B. Abandonment as a ground for termination of parental rights

¶ 19 **[2]** In her second argument, respondent-mother contends that the evidence in this case did not support the trial court's Findings of Fact 14, 15, 20, 21, and 28. She also asserts that Finding of Fact 29 and Conclusion of Law 3 were not proven by clear, cogent, and convincing evidence and that both erroneously establish that the ground of abandonment existed for the potential termination of her parental rights. *See* N.C.G.S. § 7B-1111(a)(7) (2021) (providing that a person's parental rights may be terminated if "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition"). Specifically, respondent-mother submits that her testimony at the adjudication hearing that she maintained communication with petitioner and Amy's father through text messages and telephone calls and "paid child support every month, as court ordered, for Amy" was sufficient to prevent the trial court from determining the existence of abandonment as a ground for termination of respondent-mother's parental rights. We disagree with this argument.

¶ 20 In an action seeking termination of parental rights, adjudication is the first stage of a two-stage process. N.C.G.S. § 7B-1109 (2021). At this initial stage, the petitioner bears the burden of proving by "clear, cogent, and convincing evidence" the existence of at least one ground for termination as specified under subsection 7B-1111(a) of the General Statutes of North Carolina. N.C.G.S. § 7B-1109(f). We review a trial court's adjudication of the existence of a ground for termination as provided in N.C.G.S. § 7B-1109 "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Montgomery*, 311 N.C. 101, 111 (1984). The trial court's conclusions of law are reviewed de novo on appeal. *In re C.B.C.*, 373 N.C. 16, 19 (2019).

¶ 21 In the context of a termination of parental rights proceeding, the ground of "[a]bandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re Young*, 346 N.C. 244, 251 (1997) (quoting *In re Adoption of Searle*, 82 N.C. App. 273, 275 (1986)). Where "a parent withholds [her] presence, [her] love, [her] care, the opportunity to display filial affection, and willfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *Pratt v. Bishop*, 257 N.C. 486, 501 (1962). Although a parent's acts and omissions, which are at times outside of the statutorily provided period, may be relevant in assessing a parent's intent and willfulness in determining the potential existence of the ground of abandonment, the dispositive time period is the six months preceding the filing of the petition for termination of parental rights. *In re C.B.C.*, 373 N.C. at 22–23; *see also* N.C.G.S. § 7B-1111(a)(7). Here, the six-month time period preceding the filing of the petition for the termination of parental rights extends from 13 November 2018 to 13 May 2019.

¶ 22 Respondent-mother offers that there was evidence adduced at the adjudication hearing indicating that respondent-mother: contacted petitioner and Amy's father regarding Amy such that petitioner did not fail to "act[ ] as a normal parent would," which is pertinent to Finding of Fact 14; paid child support in good faith during the relevant time period and did not know or willfully intend that those funds would go to the father rather than to petitioner to support Amy, which is pertinent to Findings of Fact 14, 15, and 20; had no duty to act affirmatively to modify the governing child support order to redirect her garnished wages to petitioner, which is pertinent to Finding of Fact 21; and did not fail to "act[ ] in any other manner consistent with being a parent," which is pertinent to Finding of Fact 28. Respondent-mother is correct that such evidence appears in the record; it was introduced at the adjudication hearing by means of respondent-mother's own testimony. However, respondent-mother conveniently fails to acknowledge or otherwise address the fact that petitioner, Amy's father, and even respondent-mother herself all provided testimony during the adjudication hearing that contradicted respondent-mother's claims of involvement with Amy during the relevant statutory period for abandonment and which could support the challenged findings of fact.

¶ 23 For example, petitioner testified at the adjudication hearing that: respondent-mother's last in-person visit with Amy was in September 2018, which is a point in time outside of the pertinent six-month statutory timeframe for determining abandonment; respondent-mother's last

telephone conversation with Amy was on 6 August 2019, also outside of the six-month time period addressed by the statute; respondent-mother did not ask petitioner about Amy's wellbeing in the single text message which respondent-mother sent to petitioner during the relevant statutory time span; respondent-mother did not send Amy any cards, gifts, or other tokens of affection during the six months immediately preceding the filing of the petition; and petitioner did not have access to any funds garnished from respondent-mother's wages for the support of Amy during this period of time which is statutorily relevant to the existence of the ground of abandonment. Respondent-mother related in her testimony that she was aware that the funds which were garnished from her wages for purposes of child support were going to Amy's father rather than going to petitioner, who had sole custody of Amy during the pertinent time period. And while respondent-mother testified that she thought that Amy's father was giving the garnished child support money to petitioner, the father testified that he used the child support funds for his own purposes instead of for the support of Amy. Additional evidence which was introduced at the adjudication hearing indicated that respondent-mother was aware that Amy's father was incarcerated during most of the six-month period preceding the filing of the petition for termination of parental rights.

¶ 24 We emphasize that, with respect to its determination of the existence of abandonment here as a ground for termination of respondent-mother's parental rights, the trial court properly considered the fact that respondent-mother allowed her garnished wages for the support of Amy to be directed to the father rather than to petitioner during the course of the relevant six-month time period regarding abandonment when petitioner had sole custody of the juvenile and respondent-mother admitted during the adjudication hearing that respondent-mother was aware of this arrangement. It is an uncommon circumstance for a parent such as respondent-mother to experience court-ordered wage garnishment in order to ensure that child support is received for the benefit of the child on one hand, while on the other hand the same non-custodial parent subject to garnishment is aware that these garnished child support payments are being received by the other parent who also does not have custody of the child. Despite respondent-mother's required compliance with the trial court's mandated wage garnishment in order to guarantee respondent-mother's payment of child support, nonetheless this consistency of payment of child support funds which was known by respondent-mother to be directed by the trial court to the father rather than to petitioner neither mandatorily qualifies this development as favorable for respondent-mother, nor mandatorily disqualifies it as

unfavorable for respondent-mother, in the trial court's determination of the existence of the ground of abandonment. These aspects, combined with the trial court's evaluation of respondent-mother's testimony at the adjudication hearing regarding her assumption that the father was passing along to petitioner the child support payments which he was receiving and the trial court's assessment of the father's testimony at the adjudication hearing that he used the child support payments for his own benefit rather than the support of the juvenile, were all proper for the trial court to include in its considerations in determining the existence of the ground of abandonment pursuant to the principles which this Court has announced in *In re Young* and *Pratt v. Bishop*.

¶ 25 In light of the evidence which was presented to the trial court regarding respondent-mother's abandonment of Amy as defined by N.C.G.S. § 7B-1111(a)(7), we determine that the findings of fact and resulting conclusion of law which respondent-mother disputes in the adjudication order must be upheld. The trial court was able to see and hear witnesses as they testified at the adjudication hearing, while assessing the witnesses' credibility and demeanor, in order to resolve any contradictions in the evidence in making the tribunal's findings of fact. On appeal, this Court is "bound by the trial courts' findings of fact where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary." *In re M.C.*, 374 N.C. 882, 886 (2020) (quoting *In re Montgomery*, 311 N.C. at 110–11). Here, there is sufficient evidence to support each of the trial court's challenged findings of fact. The essential underlying findings of fact that would support the ultimate finding of fact and eventual conclusion of law that the ground of abandonment existed to permit the termination of respondent-mother's parental rights to Amy—that respondent-mother: did not visit with Amy; did not provide Amy with any correspondence, gifts, affection, or support; did not in any other manner evince a desire to engage in parental duties or act in a parental manner; and was aware that although her wages were being garnished for the support of Amy, these funds were going to the father rather than to petitioner, who respondent-mother knew had custody of Amy—were proven by clear, cogent, and convincing evidence. Accordingly, we affirm the adjudication portion of the trial court's order.

C. Best interests determination

¶ 26 **[3]** The second stage of a termination of parental rights proceeding, which transpires only if at least one ground supporting termination of parental rights is found to exist at the adjudication stage, is a consideration of whether the disposition would be in the juvenile's best interests. *See* N.C.G.S. § 7B-1110(a) (2021). "If [the trial court] determines that one

or more grounds listed in [N.C.G.S. §] 7B-1111 are present, the court proceeds to the dispositional stage, at which the court must consider whether it is in the best interests of the juvenile to terminate parental rights." *In re D.L.W.*, 368 N.C. 835, 842 (2016) (first citing *In re Young*, 346 N.C. at 247; and then citing N.C.G.S. § 7B-1110 (2015)). "At the disposition stage, the trial court solely considers the best interests of the child. Nonetheless, facts found by the trial court are binding absent a showing of an abuse of discretion." *In re J.H.*, 373 N.C. 264, 268 (2020) (quoting *In re N.G.*, 186 N.C. App. 1, 10 (2007)); *see also* N.C.G.S. § 7B-100(5) (2021) ("[T]he best interests of the juvenile are of paramount consideration . . . ."). An abuse of discretion is shown where a trial "court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re T.L.H.*, 368 N.C. 101, 107 (2015) (quoting *State v. Hennis*, 323 N.C. 279, 285 (1988)).

¶ 27 The Juvenile Code provides that

> [i]n determining the best interests of a child during the dispositional phase of the termination of parental rights hearing, the trial court must make relevant findings concerning: (1) the age of the juvenile, (2) the likelihood of adoption, (3) whether termination will aid in the accomplishment of the permanent plan, (4) the bond between the juvenile and the parent, (5) the quality of the relationship between the juvenile and the proposed permanent placement, and (6) any relevant consideration.

In re J.H., 373 N.C. at 270 (citing N.C.G.S. § 7B-1110(a) (2019)). In the present case, the trial court made specific findings of fact on each of the above-referenced statutory criteria.

¶ 28 Respondent-mother contends that the trial court abused its discretion in terminating respondent-mother's parental rights because the disposition was not in the best interests of Amy for several reasons, including: (1) the guardian ad litem did not recommend that respondent-mother's parental rights be terminated; (2) Amy did not want respondent-mother's parental rights to be terminated; and (3) the trial court's decision was arbitrary in that the parental rights of respondent-mother were terminated in this action while the father's parental rights were not.[4] Upon review, none of respondent-mother's

4. Respondent-mother also contends that the trial court abused its discretion in finding that the termination of her parental rights was in Amy's best interests because the trial court erred in concluding that a ground existed to permit the termination of parental

arguments succeed in establishing that the trial court abused its discretion in concluding that the termination of respondent-mother's parental rights was in Amy's best interests.

¶ 29 The portion of the trial court's order which addressed disposition included a finding of fact acknowledging that the guardian ad litem had not recommended the termination of respondent-mother's parental rights. In so doing, the trial court indicated that it had "considered the report and testimony of the guardian ad litem. The court, however, was not bound by that recommendation." *In re A.U.D.*, 373 N.C. 3, 11 (2019) (emphasis omitted) (citing *In re D.L.W.*, 368 N.C. at 843, for the proposition that the trial court must "consider all the evidence, pass upon the credibility of the witnesses, and determine the reasonable inferences to be drawn therefrom"). While the role of the guardian ad litem is critical in every juvenile case, with the testimony and reports of the guardian ad litem serving as important evidence at every phase of a case's proceeding, nonetheless a guardian ad litem's recommendation regarding the best interests of a juvenile at the dispositional stage of a termination of parental rights case is not controlling. Rather, "because the trial court possesses the authority to weigh *all* of the evidence, the mere fact that it elected not to follow the recommendation of the guardian *ad litem* does not constitute error," let alone an abuse of discretion. *Id.* (emphasis added).

¶ 30 With regard to respondent-mother's claim that Amy did not want respondent-mother's parental rights to be terminated, respondent-mother's own presentation of the evidence on this circumstance is not as supportive of respondent-mother's stance concerning the juvenile Amy's wishes as respondent-mother unequivocally represents. Respondent-mother has submitted to this Court the following passage from the guardian ad litem's testimony at the trial court hearing:

> [W]hen I spoke to [Amy] about the termination she was very upset. The first thing in her mind she thought of is that she could possibly be taken out of [petitioner's] home. And so she did not want to be removed. However, when I—and at this time that I was speaking to her in terms of a termination about [respondent-mother] and [the father], because they were both still pending at that time, and [Amy]

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rights as specified in N.C.G.S. § 7B-1110. Having previously discussed the reasons why we reject respondent-mother's challenge to the trial court's determination that the ground of abandonment existed in this case, we do not revisit the issue here.

> seemed to be upset about the idea of the termination, about not being able to speak to [respondent-mother and the father] again. She didn't have anything bad to say about either one of them. It was obvious that she understands that [petitioner] is her caregiver, her provider. But she had fond things to say about both [respondent-mother] and [the father]. And so when I asked her about not, you know, did she understand that if their rights were terminated that they wouldn't be her mom and dad anymore, and that, you know, she didn't have to speak to them, she may not, you know, be allowed to speak to them anymore. And she got visibly upset over that.
>
> So I felt—that bothered me, that it hadn't been discussed with her, because she was so mature for her age. And maybe, you know, somebody should have went over that with her, especially before I popped in and, you know, broke, broke the news to her.

While respondent-mother gratuitously gilds this testimony of the guardian ad litem to indicate that Amy did not want respondent-mother's parental rights to be terminated, the guardian ad litem's account of Amy's reaction to the prospect of the termination of parental rights is more accurately depicted as the juvenile's apprehension about the legal and practical impact of such an outcome. Neutrally recounted, the guardian ad litem related that Amy feared being removed from petitioner's residence; that Amy made fond comments about respondent-mother and the father; that Amy was upset by the idea that Amy would not be able to speak to respondent-mother and the father if their parental rights were terminated; and that Amy should have had the legal proceeding and its effects reviewed with her prior to the hearing's occurrence. There is nothing in this segment of the guardian ad litem's testimony which is cited by respondent-mother to indicate that Amy did not want respondent-mother's parental rights to be terminated and nothing from which we can conclude that the trial court abused its discretion in determining that the termination of respondent-mother's parental rights was in the juvenile Amy's best interests.

¶ 31 Respondent-mother's remaining argument regarding the best interests determination by the trial court is that the forum abused its discretion in that "[t]here is an overall inequity in allowing [the father] to maintain a relationship with Amy while terminating [respondent-mother's] rights. . . . [Respondent-mother] was not a worse parent than [the father].

Treating her differently amounted to an abuse of discretion." The proper focus of the trial court at the dispositional phase of the case was on the best interests of *Amy*, not the equities between *the parents*. *In re J.H.*, 373 N.C. at 268. The trial court did not abuse its discretion in this regard.

¶ 32 We conclude that the trial court properly exercised its discretion to make a reasoned decision regarding the issue of whether termination of respondent-mother's parental rights was in Amy's best interests.

III. Conclusion

¶ 33 In conclusion, this Court holds that petitioner established her standing pursuant to statutory requirements to bring the underlying petition, that the evidence before the trial court sufficiently demonstrated the existence of a statutory ground for termination, and that the trial court did not abuse its discretion in concluding that termination of respondent-mother's parental rights was in the juvenile Amy's best interests.

AFFIRMED.

Justice EARLS concurring.

¶ 34 I agree that petitioner has standing to bring this action against respondent-mother for the reasons articulated by the majority. I write separately on the question of whether the trial court's findings of fact support its legal conclusion that: "Petitioner has proven by clear, cogent, and convincing evidence that Respondent has abandoned the minor child within the meaning of North Carolina General Statutes § 7B-1111(a)(7)." We have recently held that "[i]f a parent withholds his presence, his love, his care, the opportunity to display filial affection, and *willfully neglects to lend support and maintenance*, such parent relinquishes all parental claims and abandons the child." *In re E.H.P.*, 372 N.C. 388, 393 (2019) (emphasis added). Applying that precedent to this case, the challenge is that respondent-mother consistently paid child support of $216 a month during the relevant six-month period preceding the filing of the petition for termination of parental rights, that is, from 13 November 2018 to 13 May 2019. Indeed, she had been regularly paying child support monthly for seven years before the termination hearing and was not in arrears.

¶ 35 I write separately because in my view, fidelity to our precedents requires that we acknowledge that fact as cutting against, rather than supporting, the ultimate legal conclusion that respondent-mother abandoned her daughter. On balance, the trial court's other findings are

sufficient to support a conclusion of abandonment, and thus I agree with the majority's ultimate conclusion on this issue. However, I do not agree with the majority that respondent-mother's awareness that her child support payments, which were paid pursuant to a court order and directly garnished from her wages, went to the child's father and not directly to petitioner, are evidence of her abandonment of her daughter.

¶ 36 While the statutory language does not support a conclusion that payment of child support alone during the relevant six-month period is an absolute bar to a finding of abandonment, the Court of Appeals has considered the payment of child support as one factor to be considered. In *In re T.C.B.*, for example, the court recited the facts regarding a father's payment of child support and concluded that "[t]hese findings regarding the payment of child support further serve to undermine the district court's conclusion of willful abandonment." *In re T.C.B.*, 166 N.C. App. 482, 488 (2004). Similarly, in *In re K.C.*, the fact that respondent-mother had paid court-ordered child support was one factor, among others, such as attending nine visitations during an eighteen-month period and speaking with her son on the phone several times, showing that her actions "are not consistent with abandonment as defined under North Carolina law." *In re K.C.*, 247 N.C. App. 84, 88 (2016).

¶ 37 To be sure, the Court of Appeals has also found that abandonment may occur even when child support was being paid or was paid inconsistently. *See, e.g.*, *In re C.J.H.*, 240 N.C. App. 489, 504 (2015) (affirming finding of abandonment despite the fact that respondent made "last-minute child support payments and requests for visitation," because during the relevant period "respondent did not visit the juvenile, failed to pay child support in a timely and consistent manner, and failed to make a good faith effort to maintain or reestablish a relationship with the juvenile"); *In re Adoption of Searle*, 82 N.C. App. 273, 276 (1986) (evidence of one $500 payment by respondent — without any other activity during the relevant time period — was sufficient to support determination that father willfully abandoned child). But all these precedents together stand for the proposition that payment of child support, whether by court order or otherwise, is a relevant factor to consider in determining whether the statutory ground of abandonment has been established.

¶ 38 Here, the majority concludes that it was proper for the trial court to consider testimony about what respondent-mother knew regarding whether the father was using her child support payments for the benefit of the child, but maintains that evidence of consistent child support payments is not "mandatorily" favorable or unfavorable to respondent-mother on the question of abandonment. However, the trial

court's order includes a "Finding of Fact" that "[r]espondent had an affirmative duty to do something, and her failure to do so is further evidence forsaking her parental responsibilities." This is not a "fact," nor is it an accurate statement of the law. Rather, our case law establishes that petitioner has the burden of proving, for the ground of abandonment, that respondent-mother "willfully neglect[ed] to lend support or maintenance," among other things. *See In re E.H.P.*, 372 N.C. at 393. Petitioner must put forward clear and convincing evidence that respondent-mother's conduct "manifest[ed] a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re Young*, 346 N.C. 244, 252 (1997). In this case, respondent-mother had an affirmative duty to comply with the court order regarding payment of child support, which she did. She did not have "an affirmative legal duty to do something" more. The fact of her consistent child support payments does not bar the ultimate conclusion of abandonment here, but the majority errs in failing to acknowledge that this factor weighed in respondent-mother's favor.

IN THE MATTER OF B.B., S.B., S.B.

No. 24A21

Filed 17 June 2022

1. Termination of Parental Rights—jurisdiction—amendments to termination order—after notice of appeal given—substantive in nature

The trial court lacked jurisdiction pursuant to N.C.G.S. § 7B-1003(b) to amend its order terminating a mother's parental rights to her children after the mother had given notice of appeal of the original termination order because the amendments—multiple additional findings of fact which were neither mentioned in the court's oral ruling nor duplicative of other findings in the original order—were not merely clerical corrections but were substantive in nature. Therefore, the amended order was void, leaving only the original order subject to appellate review.

2. Termination of Parental Rights—motion to continue hearing—denied—no prejudice

The trial court did not abuse its discretion by denying respondent-mother's motion to continue a termination of parental rights

hearing (made on her behalf by her counsel when respondent did not appear at the hearing) where respondent failed to show the denial caused her prejudice, since she did not state that she would have testified or that a different outcome would have resulted if the motion had been allowed.

3. Termination of Parental Rights—grounds for termination—neglect—continued criminal activity—failure to engage with case plan

The trial court properly terminated respondent-mother's parental rights to her children on the ground of neglect based on findings, which were supported by clear, cogent, and convincing evidence, that, while the children were in DSS custody, respondent incurred new criminal charges; did not provide gifts, notes, letters, tangible items, or financial support to her children; and did not complete any aspect of her case plan. Respondent's periods of incarceration were not an adequate excuse for her lack of engagement with her children.

4. Constitutional Law—effective assistance of counsel—termination of parental rights—prejudice analysis

In a termination of parental rights matter, respondent-mother failed to show prejudice and therefore was not entitled to relief on her claim of ineffective assistance of counsel—in which she alleged that her counsel failed to ensure respondent was present at the hearings, seek visitation, file a response to the termination petition, assert due process claims, or advocate sufficiently. Based on evidence of numerous communications between respondent and her counsel throughout the proceedings, and respondent's failure to complete any part of her case plan despite understanding what was expected, she did not demonstrate that there was a reasonable probability of a different outcome absent the alleged errors by counsel.

Justice EARLS dissenting.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) (2019) from an order entered on 29 October 2020 and an order entered on 23 February 2022 after remand, both by Judge Wesley W. Barkley in District Court, Burke County. Heard originally in the Supreme Court on 5 October 2021 and calendared again for argument in the Supreme Court on 10 May 2022 but determined on the record and briefs without further oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

IN RE B.B.

[381 N.C. 343, 2022-NCSC-67]

Amanda C. Perez for petitioner-appellee Burke County Department of Social Services.

Olabisi A. Ofunniyin and Thomas N. Griffin III for appellee Guardian ad Litem.

W. Michael Spivey for respondent-appellant mother.

BARRINGER, Justice.

¶ 1 Respondent appeals from an order terminating her parental rights to three of her minor children, B.B. (Bob), S.B. (Sally) and S.B. (Susan).[1] After careful review, we affirm the trial court's order.

I. Background

¶ 2 On 14 September 2018, the Burke County Department of Social Services (DSS) received a Child Protective Services (CPS) report stating that respondent was incarcerated, and Bob, Sally, and Susan were living in a car with their father. The report further alleged that the father was suspected of using methamphetamine. DSS confirmed that respondent was incarcerated and met with the father at the home of his sister. The father claimed that he and the children were staying at his sister's home. The father signed a Safety Assessment in which he agreed the children would remain in his sister's home, and he would submit to a substance abuse screening within twenty-four hours. However, when a social worker returned to the home on 19 September 2018, the father had left the home and taken the children with him without providing any contact information.

¶ 3 On 21 September 2018, DSS was notified that the father brought Bob to school. Bob was wearing the same dirty and torn clothing that he had worn the previous day and stated that he had not eaten since the day before. At the end of the school day, nobody arrived to pick up Bob from school. DSS then contacted respondent, who was still incarcerated, and attempted without success to locate an appropriate alternative caregiver for the children based on information from respondent. Meanwhile, the father's sister notified DSS that the father had left Sally and Susan in her care without providing his contact information or making a plan of care for the children. The father's sister also refused to continue caring

1. Pseudonyms are used in this opinion to protect the juveniles' identities and for ease of reading.

for the children. At the time, Bob had eight unexcused absences from school and one tardy; Sally had a scar on her torso, which she stated was a cut with a knife from her father; and Susan had a diaper rash, fever, and two red bumps on her torso. Additionally, all the children had an odor about them. DSS was unable to locate the father.

¶ 4 The same day, DSS filed a petition alleging that the juveniles were neglected and dependent and obtained non-secure custody of Bob, Sally, and Susan. On 26 September 2018, DSS filed an amended petition.

¶ 5 Meanwhile, on 24 September 2018, respondent was released from custody, but she still had pending criminal charges in four counties including a probation violation. Respondent admitted to DSS the next day that she was unable to get the juveniles regular medical care and that for the last six months she had unstable housing. Respondent also refused to submit to a drug screen; she wanted to consult her attorney first. Respondent had previously tested positive for methamphetamines in 2017 and had a history of drug use. Susan tested positive at birth in 2017 for amphetamines, cannabinoids, and methamphetamine via meconium screening.

¶ 6 Before the hearing on the petition on 10 January 2019, respondent stipulated to the foregoing facts and stipulated that she was not employed and living with friends in a home that was not appropriate for children. Based upon stipulations made by respondent and the father, the trial court entered an order on 24 January 2019 adjudicating Bob, Sally, and Susan as neglected and dependent juveniles. The trial court continued custody of the juveniles with DSS. The trial court also ordered respondent to comply with an out-of-home family services agreement (case plan) and granted her supervised visitation.

¶ 7 The trial court held review hearings on 7 March 2019 and 16 May 2019. The trial court entered review orders from both hearings in which it found as fact that respondent was unemployed, did not have stable housing, had not maintained consistent contact with DSS, and had not engaged in any case plan services.

¶ 8 Following a permanency-planning-review hearing held on 15 August 2019, the trial court entered an order on 5 September 2019. The trial court found as fact that respondent had recently been arrested on drug related charges in Buncombe County. The trial court again found as fact that respondent was not engaged in case plan services and had failed to maintain consistent contact with DSS. The trial court adopted a primary permanent plan of adoption with a secondary plan of reunification.

¶ 9 On 22 October 2019, DSS moved to terminate respondent's parental rights to each of the three juveniles on the grounds of neglect, willful failure to make reasonable progress, willful failure to pay for the cost of care for the juveniles, and abandonment. N.C.G.S. § 7B-1111(a)(1)–(3), (7) (2021). Following a hearing held on 4 September 2020, the trial court entered an order on 29 October 2020 in which it determined grounds existed to terminate respondent's parental rights pursuant to each of the grounds alleged in the motion. The trial court further concluded it was in the juveniles' best interests that respondent's parental rights be terminated. Accordingly, the trial court terminated respondent's parental rights.[2] Respondent entered a notice of appeal on 2 November 2020. On 13 November 2020, the trial court entered an amended termination order.

¶ 10 On appeal, respondent presents four arguments. First, the trial court lacked jurisdiction to enter an amended termination order because notice of appeal had already been given, and the trial court made substantive, not clerical, changes. Second, the trial court abused its discretion by denying respondent's motion to continue. Third, the trial court erred by concluding that grounds existed to terminate respondent's parental rights. Fourth, respondent received ineffective assistance of counsel.

¶ 11 On 5 October 2021, this Court heard oral arguments concerning this appeal. Thereafter, this Court issued an order in the exercise of its discretion remanding the case "so the parties may supplement the record with evidence related to the trial court's statements on the record concerning respondent-mother's motion to continue on 4 September 2020" and "for the trial court to hear respondent-mother's claim of ineffective assistance of counsel." *In re B.B.*, 379 N.C. 660, 660 (2021) (order remanding case).

¶ 12 On remand, the trial court made findings of facts and conclusions of law and denied respondent's Rule 60(b) motion alleging ineffective assistance of counsel. Then, consistent with this Court's order, the parties supplemented the record on appeal and filed supplemental briefs for this Court. Thus, this appeal is now ripe for our full consideration.

II. Analysis

A. Jurisdiction

¶ 13 **[1]** We first consider respondent's argument that the trial court lacked jurisdiction to enter the amended termination order after respondent

2. The trial court's order also terminated the parental rights of the juveniles' father, but he did not appeal and is not a party to the proceedings before this Court.

had noticed her appeal because the trial court made substantive, not clerical, changes to the order. We agree that the trial court lacked jurisdiction to enter the amended termination order.

¶ 14 Generally, upon perfection of an appeal, N.C.G.S. § 1-294 "stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein." N.C.G.S. § 1-294 (2021); *see also Am. Floor Mach. Co. v. Dixon*, 260 N.C. 732, 735 (1963) ("As a general rule, an appeal takes a case out of the jurisdiction of the trial court."). However, "[w]hen a specific statute addresses jurisdiction during an appeal . . . that statute controls over the general rule." *In re M.I.W.*, 365 N.C. 374, 377 (2012). This Court recognized in *In re M.I.W.* that the legislature enacted a specific statute, N.C.G.S. § 7B-1003, regarding jurisdiction during an appeal for matters arising under the Juvenile Code that controls over N.C.G.S. § 1-294. *Id.* at 377–78. The legislature recognized that the "needs of the child may change while legal proceedings are pending on appeal," necessitating "a modified approach" to jurisdiction during an appeal in juvenile cases. *Id.* at 377.

¶ 15 As relevant to this appeal, N.C.G.S. § 7B-1003(b) provides as follows:

> (b) Pending disposition of an appeal, unless directed otherwise by an appellate court or subsection (c) of this section applies, the trial court shall:
>
> (1) Continue to exercise jurisdiction and conduct hearings under this Subchapter with the exception of Article 11 of the General Statutes; and
>
> (2) Enter orders affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile.

N.C.G.S. § 7B-1003(b) (2021).

¶ 16 Article 11 of the Juvenile Code is entitled and addresses termination of parental rights. N.C.G.S. § 7B-1100 to -1114 (2021). Thus, absent direction from an appellate court to the contrary, "N.C.G.S. § 7B-1003(b) does not divest the court of jurisdiction in termination proceedings during an appeal but does . . . prohibit the trial court from exercising jurisdiction in termination proceedings while disposition of an appeal is pending." *In re J.M.*, 377 N.C. 298, 2021-NCSC-48, ¶ 17.

> Exercising jurisdiction, in the context of the Juvenile Code, requires putting the [trial] court's jurisdiction into action by holding hearings, entering substantive

> orders or decrees, or making substantive decisions on the issues before it. In contrast, having jurisdiction is simply a state of being that requires, and in some cases allows, no substantive action from the [trial] court.

In re M.I.W., 365 N.C. at 379.

¶ 17 In this matter, after respondent filed her notice of appeal and before this Court took any action, the trial court entered an amended order with multiple additional findings of fact. Several of these findings of fact are neither findings of fact mentioned in the trial court's oral ruling nor duplicative of other findings of fact in the original termination-of-parental-rights order. Thus, we are not persuaded that these changes corrected a clerical mistake or error arising from oversight or omission. *See* N.C.G.S. § 1A-1, Rule 60(a) (2021) ("Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge at any time on his own initiative or on the motion of any party and after such notice, if any, as the judge orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate division, and thereafter while the appeal is pending may be so corrected with leave of the appellate division."). Rather, we conclude that the trial court exercised jurisdiction by entering a termination-of-parental-rights order that made substantive changes when the trial court lacked jurisdiction to do so under N.C.G.S. § 7B-1003(b). As a result, the amended termination-of-parental-rights order is void, and we only consider the original termination-of-parental-rights order that was entered on 29 October 2020 and the 23 February 2022 order entered after remand and pursuant to this Court's order.

B. Continuance

¶ 18 **[2]** We next consider respondent's argument that the trial court abused its discretion by denying her counsel's motion to continue the termination hearing. Assuming without deciding that the trial court erred, we conclude that respondent has not shown that she was prejudiced by the denial of the motion to continue. Therefore, respondent is not entitled to any relief.

¶ 19 The record reflects that at the outset of the termination hearing, respondent had not appeared, and the trial court asked respondent's counsel if he had any contact with her. Counsel responded that respondent had bonded out of jail the night before and he had not heard from her and moved to continue the hearing in order to locate respondent. The

trial court, after again determining that respondent was not in the courtroom, summarily denied the motion to continue. The trial court noted for the record that

> [respondent] was prepared for transport yesterday at some point, so she knew of today's court date. She did bond out, but she is not present today, despite the fact that she was aware yesterday and prepared to come to court yesterday. We do have the Respondent Father here, and we will proceed.[3]

¶ 20 The standard of review for addressing motions to continue is well-established. When a respondent "did not assert in the trial court that a continuance was necessary to protect a constitutional right," appellate courts "review the trial court's denial of her motion to continue only for abuse of discretion." *In re A.L.S.*, 374 N.C. 515, 517 (2020). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* (cleaned up). "Continuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it." *In re J.E.*, 377 N.C. 285, 2021-NCSC-47, ¶ 15 (cleaned up). Under the Juvenile Code, "[c]ontinuances that extend beyond 90 days after the initial petition shall be granted only in extraordinary circumstances when necessary for the proper administration of justice." N.C.G.S. § 7B-1109(d) (2021). "Moreover, regardless of whether the motion raises a constitutional issue or not, a denial of a motion to continue is only grounds for a new trial when [the respondent] shows both that the denial was erroneous, and that [the respondent] suffered prejudice as a result of the error." *In re A.L.S.*, 374 N.C. at 517 (cleaned up).

¶ 21 In her supplemental brief, respondent contends that "[t]he trial court acknowledged that it acted upon incorrect information when it denied counsel's motion to continue," and "[h]ad Judge Barkley known all of the[ ] facts when the matter was called for hearing on September 4 it seems unlikely that he would have denied even a few minutes for counsel to locate [respondent]." Yet even taking respondent's presumption as true, respondent has not shown how she suffered prejudice as a result of the alleged error. Respondent has not shown that she "would have testified and that such testimony would have impacted the outcome of

3. Pursuant to this Court's order, the record has been supplemented concerning the basis for the trial court's first two statements. It is undisputed that the father was present for the termination hearing as reflected in the trial court's last statement.

the proceeding." *In re C.C.G.*, 380 N.C. 23, 2022-NCSC-3, ¶ 14; *see also In re D.J.*, 378 N.C. 565, 2021-NCSC-105, ¶ 14 ("Based on the record before us, respondent's offer of proof fails to demonstrate the significance of the witness's potential testimony and any prejudice arising from the trial court's denial of her motion to continue."); *In re H.A.J.*, 377 N.C. 43, 2021-NCSC-26, ¶ 13 ("[B]ased upon the record before us, we conclude respondent-mother has failed to demonstrate prejudice. She has not demonstrated how her case would have been better prepared, or a different result obtained, had a continuance been granted."). Therefore, regardless of whether the denial of the motion to continue was erroneous, respondent is not entitled to any relief.

C. Grounds for Termination

¶ 22 **[3]** We next consider respondent's argument that the trial court erred by concluding that grounds existed to terminate her parental rights at the adjudicatory stage. Since the trial court's findings of fact support termination on the grounds of neglect pursuant to N.C.G.S. § 7B-1111(a)(1) and only one ground is necessary for termination, we conclude that the trial court did not err by adjudicating the ground of neglect and terminating respondent's parental rights.

¶ 23 At the adjudicatory stage, the trial court takes evidence, finds facts, and adjudicates the existence or nonexistence of the grounds for termination set forth in N.C.G.S. § 7B-1111. N.C.G.S. § 7B-1109(e). The trial court may terminate parental rights upon an adjudication of any one of the grounds in N.C.G.S. § 7B-1111(a). N.C.G.S. § 7B-1111(a); *see also In re E.H.P.*, 372 N.C. 388, 395 (2019). We review a trial court's adjudication to determine whether the findings are supported by clear, cogent, and convincing evidence and whether the findings of fact support the conclusions of law. *In re E.H.P.*, 372 N.C. at 392. "Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407 (2019).

¶ 24 A trial court may terminate parental rights pursuant to N.C.G.S. § 7B-1111(a)(1) if "[t]he parent has abused or neglected the juvenile" as defined in N.C.G.S. § 7B-101. N.C.G.S. § 7B-1111(a)(1). A neglected juvenile is defined, in pertinent part, as a juvenile "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; . . . or who lives in an environment injurious to the juvenile's welfare . . . ." N.C.G.S. § 7B-101(15) (2019). As explained by this Court,

> [t]ermination of parental rights based upon this statutory ground requires a showing of neglect at the time of the termination hearing or, if the child has been

> separated from the parent for a long period of time, there must be a showing of a likelihood of future neglect by the parent. When determining whether such future neglect is likely, the [trial] court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing.

In re R.L.D., 375 N.C. 838, 841 (2020) (cleaned up).

¶ 25 In this case, respondent argues that the trial court's findings of fact are insufficient to support termination on the ground of neglect because the trial court did not analyze respondent's ability to participate in the case plan or provide support to her children during her incarceration. Respondent also challenges finding of fact 40 as not supported by the evidence. We disagree: competent evidence supports finding of fact 40, and the findings of fact support the trial court's adjudication of neglect.

¶ 26 Here, the trial court's findings of fact reflect that the juveniles came into the custody of DSS on 21 September 2018. At that time, respondent was incarcerated. DSS contacted respondent by phone in jail and made efforts to locate an appropriate caregiver, but an appropriate caregiver could not be located. Respondent had a history of drug use and had tested positive for methamphetamines in September 2017. Susan also tested positive for amphetamines, cannabinoids, and methamphetamine at birth in 2017. Respondent stipulated to these facts and others, and the trial court entered an order adjudicating Bob, Sally, and Susan neglected and dependent juveniles on 24 January 2018. Thereafter, respondent entered into a case plan, which included: (1) submitting to a substance abuse assessment and following all recommended treatment; (2) complying with random drug screens; (3) completing a parenting capacity evaluation; (4) completing a parenting education program; (5) obtaining and maintaining safe and stable housing; (6) refraining from criminal activity; and (7) obtaining and maintaining a legal source of income.

¶ 27 The trial court further found as follows:

> 28. The respondent mother has not addressed the issues that led to the juvenile[s] being taken into care.
>
> 29. The respondent mother has continued to engage in criminal behavior, including incurring criminal charges while the minor children have been in [DSS]'s custody.

30. Respondent mother was arrested in July of 2019 for felony counts of larceny, fleeing to elude arrest, possession of a stolen vehicle, driving while license revoked, failure to maintain lane control, speeding, reckless driving to endanger, possession of stolen property, and possession of methamphetamine.

31. At the time of this hearing, the respondent mother had recently been released from custody and had pending charges in Burke and Catawba Counties.

. . . .

34. [Respondent mother has] been out of custody at times while the minor children have been in [DSS]'s custody, but [has not] engaged with [DSS] or completed any part of [her] case plan[].

. . . .

38. Respondent mother does not have a child support order established and she has not voluntarily paid any support for the benefit of the juveniles since they came into [DSS]'s custody.

. . . .

40. [Respondent mother has not] provided any gifts, notes, letters or provided any necessities [for the juveniles] since the children came into [DSS]'s custody.

41. Pursuant to N.C.G.S. § 7B-1111(a)(1), [respondent mother has] neglected the juveniles as shown by findings [of] fact and conclusions of law contained in the adjudication order rendered by the Honorable Wesley W. Barkley and as specified above. There is a high likelihood of a repetition of the neglect if the juveniles were returned to the care and control of the [respondent mother as she has] not corrected the conditions that led to the removal of the juveniles.

¶ 28 Respondent only challenges finding of fact 40 as not supported by clear, cogent, and convincing evidence. However, at the termination-of-parental-rights hearing, a DSS social worker responded "no" when asked whether respondent had provided "anything" for her children. Given this

testimony, the trial court could find that respondent had not provided the juveniles with any gifts, notes, letters, or necessities since they entered into DSS's custody. *See In re D.L.W.*, 368 N.C. 835, 843 (2016) (stating that it is the trial court's duty to consider all the evidence, pass upon the credibility of the witnesses, and determine the reasonable inferences to be drawn therefrom). Thus, we conclude that finding of fact 40 is supported by clear, cogent, and convincing evidence.

¶ 29 We also reject respondent's argument that the findings of fact do not support the trial court's adjudication of neglect. This Court has stated:

> Our precedents are quite clear—and remain in full force—that incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision. How this principle applies in each circumstance is less clear. While respondent's incarceration, by itself, cannot serve as clear, cogent, and convincing evidence of neglect, it may be relevant to the determination of whether parental rights should be terminated.

In re J.S., 377 N.C. 73, 2021-NCSC-28 ¶ 21 (cleaned up).

¶ 30 Here, the findings of fact reflect respondent had been out of custody at times while the juveniles were in DSS's custody but did not engage with DSS or completed *any* part of her case plan. Further, respondent did not provide gifts, notes, letters, necessities, or financial support to Bob, Sally, or Susan. Notably, respondent also continued to engage in criminal behavior and incurred criminal charges while Bob, Sally, and Susan were in DSS's custody. Respondent's case plan required her to refrain from criminal activity.

¶ 31 Given the foregoing, we are not persuaded by respondent's arguments. Continued criminal activity and a failure to complete a case plan when not incarcerated for the entirety of the case supports a determination of likelihood of future neglect. *See In re J.E.*, 377 N.C. 285, 2021-NCSC-47, ¶ 26; *In re J.M.J.-J.*, 374 N.C. 553, 566 (2020). Further, while recognizing the potential limitations of incarceration, our precedent does not excuse parents who are incarcerated from "showing interest in the child's welfare by whatever means available," and "requir[es parents] to do what they can to exhibit the required level of concern for their children." *In re A.G.D.*, 374 N.C. 317, 320 (2020) (cleaned up). Thus, we are not convinced that respondent's periods of incarceration should excuse respondent from failing to provide any gifts, notes, letters, necessities, or financial support to her children for almost two

years. *See In re W.K.*, 376 N.C. 269, 278–79 (2020) (stating that father's failure to send cards or gifts, despite being able to do so, supported a determination that neglect would reoccur should his children be returned to his care). Therefore, we conclude that the findings of fact support the trial court's conclusion of neglect.

¶ 32 Because the trial court's conclusion that a ground for termination existed pursuant to N.C.G.S. § 7B-1111(a)(1) is sufficient in and of itself to support termination of respondent's parental rights, *In re E.H.P.*, 372 N.C. at 395, we need not address respondent's arguments regarding N.C.G.S. § 7B-1111(a)(2), (3) and (7). Furthermore, respondent does not challenge the trial court's conclusion at the dispositional stage that termination of her parental rights was in the juveniles' best interests.

D. Ineffective Assistance of Counsel Claim

¶ 33 **[4]** On appeal in her initial briefs and at oral argument, respondent alleged that she received ineffective assistance of counsel at the termination hearing and claimed that her counsel failed to secure her presence at hearings, seek visitation, file a response to the petition to terminate her parental rights, assert her due process concerns when moving to continue the termination hearing, and advocate for her at the termination hearing.

¶ 34 After oral arguments, this Court remanded to the trial court in the exercise of its discretion "for the trial court to hear respondent-mother's claim of ineffective assistance of counsel." *In re B.B.*, 379 N.C. at 660. We observed that the "record before this Court contains no findings of fact or conclusions of law as to the claim of ineffective assistance of counsel because respondent-mother asserted her claim of ineffective assistance of counsel for the first time on appeal and has not sought relief from the trial court." *Id.* We provided that "within ten days of this order, appellate counsel for respondent-mother may file a Rule 60(b) motion with evidentiary support to set aside the termination-of-parental-rights order as to respondent-mother for ineffective assistance of counsel." *Id.* Additionally, if such a motion was filed, we ordered the trial court to hold an evidentiary hearing if necessary and "enter an order with any necessary findings of fact and conclusions of law" needed to address respondent-mother's Rule 60(b) motion regarding ineffective assistance of counsel. *Id.* at 661.

¶ 35 On remand, the trial court held an evidentiary hearing and entered an order with findings of fact and conclusions of law. The trial court concluded that respondent failed to provide any evidence or argument showing a reasonable probability that, but for deficient counsel, a

different result would have been reached in the termination proceeding. Thus, the trial court denied respondent's Rule 60(b) motion.

¶ 36 In her supplemental brief, respondent presented several arguments. First, respondent challenges the trial court's finding of fact "that there was no evidence that could have been presented to alter the result of the termination proceeding" and cites to findings of fact 42 and 44 through 50. The cited findings of fact from the trial court's order are as follows:

> 42. Throughout the underlying case, the respondent mother did not inform [her trial counsel] of any actions she had taken to be reunited with her children or any argument he needed to make regarding her progress, despite having the opportunity to do so.
>
> . . . .
>
> 44. The respondent mother did not provide evidence of what she would have testified to at the termination of parental rights hearing, had she been present.
>
> 45. The respondent mother did not identify evidence or witnesses that should have been presented at the termination of parental rights hearing, other than testifying that she wanted to provide gifts and letters to her children. As noted, the court finds that no such efforts were made prior to the filing of the motion for termination of parental rights.
>
> 46. There is no evidence that the respondent mother could have been presented in a more favorable manner on September 4, 2020 at the termination hearing.
>
> 47. In the absence of any showing of evidence or testimony that could have been presented, the court finds that, even if respondent mother had been present and available at every hearing throughout the pendency of the underlying case, the outcome of the termination hearing would have been the same.
>
> 48. The court received no evidence to contradict its findings in the underlying order support-

> ing grounds for termination under N.C.G.S. § 7B-1111(a)(l), (2), or (7).
>
> 49. There is no evidence that the outcome of the termination hearing would have been different had her trial counsel's performance been different.
>
> 50. The respondent mother was not prejudiced by her trial counsel's performance.

¶ 37 However, the cited findings of fact, which are quoted above, do not contain a finding "that there was no evidence that *could* have been presented to alter the result of the termination proceeding." (Emphasis added.) The trial court did find that respondent did not put forth material evidence that could have been presented at the termination hearing, but these are not analogous. Thus, there is no finding of fact for this Court to review as it relates to respondent's argument, and we are bound to the findings of facts. *In re K.N.L.P.*, 2022-NCSC-39, ¶ 15 (2022). Later in this opinion, we address respondent's argument that the trial court erred by concluding that she failed to put forward evidence to meet her burden to show that there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings. However, that does not appear to be the argument respondent makes here.

¶ 38 Second, respondent argues that the trial court erred by not applying the correct standard to assess prejudice. Respondent-mother claims that the trial court "held that respondent-mother failed to present evidence at the Rule 60 hearing showing that she would have 'won' and received a favorable ruling at the termination hearing." However, as stated in the trial court's order, the trial court articulated and applied the standard of "reasonable probability," which is consistent with our precedent. The trial court stated:

> 8. Respondent mother was not prejudiced by her trial counsel's performance, either in the termination hearing or the underlying case, in that she did not establish a reasonable probability that the outcome of the termination hearing (or other hearings) would have been different but for trial counsel's conduct.

¶ 39 This Court has explained that:

> To prevail on a claim of ineffective assistance of counsel, respondent must show that counsel's performance was deficient and the deficiency was so

> serious as to deprive him of a fair hearing. *To make the latter showing, the respondent must prove that there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings.*

In re G.G.M., 377 N.C. 29, 2021-NCSC-25, ¶ 35 (cleaned up) (emphasis added). Respondent's initial brief acknowledges that our precedent requires this showing, citing *In re T.N.C.*, 375 N.C. 849, 854 (2020).

¶ 40 Applying this standard in proceedings under the Juvenile Code, we routinely resolve claims of ineffective assistance of counsel on the respondent's failure to show prejudice. *See, e.g.*, *In re Z.M.T.*, 379 N.C. 44, 2021-NCSC-121, ¶ 17; *In re B.S.*, 378 N.C. 1, 2021-NCSC-71, ¶ 13; *In re N.B.*, 377 N.C. 349, 2021-NCSC-53, ¶ 30; *In re J.M.*, 377 N.C. 298, 2021-NCSC-48, ¶ 36; *In re G.G.M.*, ¶ 35. Resolving claims of ineffective assistance of counsel on the respondent's failure to show prejudice is consistent with the recommendation by the Supreme Court of the United States and this Court's precedent in criminal proceedings. *State v. Braswell*, 312 N.C. 553, 563 (1985) ("[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result." (quoting *Strickland v. Washington*, 466 U.S. 668, 697 (1984)).

¶ 41 Third, respondent argues that the trial court erred by failing to consider the cumulative effect of respondent's trial counsel's deficient performance and by not correctly applying the standard to assess prejudice. However, the trial court's conclusion of law eight reflects that the trial court considered cumulative prejudice. The trial court expressly considered whether respondent was prejudiced by her trial counsel's performance both "in the termination hearing" and "in the underlying case." Yet, as discussed, the trial court's findings of fact supporting these conclusions were either unchallenged or supported by competent evidence. Accordingly, were we to address this argument, we would be bound to affirm the trial court's conclusion that respondent was not cumulatively prejudiced. Because the trial court in this case did consider cumulative prejudice, we need not address whether cumulative prejudice must be considered by the trial court in this context.

¶ 42 Given the binding findings of fact before us, we agree with the trial court that respondent failed to put forward evidence to meet her burden to show that there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

> In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

Id. at 695–96.

¶ 43 In the case before us, the same trial court judge presided over the termination hearing and respondent's Rule 60(b) motion. The trial court had the totality of the evidence before him, and we do as well. We are not persuaded that a probability sufficient to undermine confidence in the outcome exists. Respondent testified that throughout the case, her trial counsel called or emailed her back every time she reached out by phone or email and that they would discuss what she could do to see her children, what she could do to get visitation, and what she could do to get her parental rights back. She testified that her trial counsel communicated with her at least 26 times throughout the length of the case. She further testified that she had met with the social worker and signed the case plan and knew what she was supposed to do for her plan without discussing it with her trial counsel. As found by the trial court, respondent understood her case plan, but respondent did not complete any element of her case plan and during the pendency of the case was both convicted of new criminal charges and violated her probation. Even if trial counsel has erred in some aspects of his representation,

> [a]ttorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid.

Strickland, 466 U.S. at 693. Therefore, we do not attempt to define what is correct and what to avoid, but merely hold that on the record before us, respondent is not entitled to relief from the trial court's termination-of-parental-rights order on the basis of ineffective assistance of counsel. Respondent was given the opportunity to prove her claim of ineffective assistance of counsel on remand before the trial court through an evidentiary hearing by an extraordinary act of discretion by this Court. Respondent failed to do so.

III. Conclusion

¶ 44 While the trial court's amended termination order was entered without jurisdiction pursuant to N.C.G.S. § 7B-1003(b), we conclude that the findings of fact in the trial court's original 29 October 2020 order supported the adjudication on the ground of neglect pursuant to N.C.G.S. § 7B-1111(a)(1). Respondent has not challenged the trial court's determination at the dispositional phrase. We have also concluded that the respondent failed to show prejudice from the denial of her counsel's motion to continue at the termination-of-parental-rights hearing and failed to show prejudice for any alleged error by her trial counsel. Accordingly, we affirm the trial court's order terminating respondent's parental rights to her children, Bob, Sally, and Susan, and the trial court's order denying respondent's Rule 60(b) motion regarding ineffective assistance of counsel.

AFFIRMED.

Justice EARLS dissenting.

¶ 45 A parent's right to effective representation in juvenile proceedings is an individual right that secures a broader structural principle. The right to counsel safeguards an individual parent's fundamental liberty interests by ensuring the parent is not subject to the unnecessary and permanent dissolution of their rights in their child. *In re T.N.C.*, 375 N.C. 849, 854 (2020) ("By providing a statutory right to counsel in termination proceedings, our legislature has recognized that this interest must be

safeguarded by adequate legal representation.") (quoting *In re Bishop*, 92 N.C. App. 662, 664 (1989)). At the same time, the right to counsel furthers the State's *parens patriae* interest in protecting a child's welfare by facilitating the "adversarial system of justice" necessary to "ascertain the truth in any legal proceeding," in the process helping the State determine what a child's best interests require. *In re Miller*, 357 N.C. 316, 334 (2003). Thus, a deprivation of a parent's right to counsel imposes both an individual and systemic harm: it jeopardizes the parent's constitutional rights as a parent and diminishes the capacity of juvenile proceedings to deliver just and accurate results based on something approaching "the truth."

¶ 46 In this case, there is no real dispute that respondent-mother did not receive adequate representation during the juvenile and termination proceedings involving her children: Bob, Sally, and Susan. Respondent-mother was in and out of jail throughout these proceedings. On numerous occasions, the trial court issued a writ to bring respondent-mother to court to participate in hearings, but she was not brought to court. Counsel did not vigorously defend respondent-mother's interests in her absence. Instead, at the final permanency planning hearing, another hearing respondent-mother was not brought to court to attend, respondent-mother's attorney informed the court that he "had not had any recent contact from his client," so he "consented to the Court receiving the court report and moving forward without his presence" because "he had another matter in another courtroom." Counsel did not file a responsive pleading to DSS's motion to terminate respondent-mother's parental rights, even though respondent-mother mailed the court a handwritten note stating that she wanted to "stop the termination process of my parental rights." At the termination hearing, counsel asked two questions of DSS's sole witness but otherwise offered no defense and made no argument on respondent-mother's behalf.

¶ 47 Under these circumstances, I cannot agree with the majority that respondent-mother's ineffective assistance of counsel (IAC) claim should be denied for failure to show prejudice. Although there is a paucity of evidence in the record indicating how respondent-mother could have rebutted the grounds for termination found by the trial court at the termination hearing, counsel's prolonged, repeated failure to adequately represent respondent-mother at every stage of these proceedings fatally undermined their validity as a mechanism for determining "the truth." Therefore, I would hold that respondent-mother has demonstrated prejudice because she has shown that "counsel's errors were so serious as to deprive the defendant of a fair [hearing], a [hearing] whose result is reliable." *State v. Braswell*, 312 N.C. 553, 562 (1985) (emphasis omitted)

(quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). I respectfully dissent.

I. Prejudice under *Strickland*

¶ 48 There are two main problems with the majority's analysis of respondent-mother's IAC claim.

¶ 49 The first is that the majority's articulation of how respondent-mother can demonstrate prejudice is unduly narrow and ignores a central concern animating *Strickland* and IAC doctrine—the critical importance of adequate representation to ensuring the integrity and validity of the adversarial process. The majority is correct that a party asserting IAC must demonstrate prejudice, and that the way courts typically examine prejudice is by assessing whether the party asserting IAC "prove[d] that there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceeding." *In re G.G.M.*, 377 N.C. 29, 2021-NCSC-25, ¶ 35 (cleaned up). But the "reasonable probability" standard does not require a party to establish that counsel's deficient performance was outcome-determinative. *Strickland*, 466 U.S. at 693 ("[A] defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case."). *Strickland* itself cautioned that "that the principles we have stated do not establish mechanical rules." *Id.* at 696. Instead, the Supreme Court emphasized that

> the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Id.

¶ 50 "The right to counsel exists in order to protect the fundamental right to a fair trial," or in this case a fair termination hearing. *Lockhart v. Fretwell*, 506 U.S. 364, 368 (1993) (cleaned up). Accordingly, the prejudice prong of *Strickland* is ultimately concerned with distinguishing between instances of deficient performance that do not undermine the reliability of an adversarial proceeding and those that do. The goal of the inquiry is to assess whether counsel's deficient performance "rose to the level of compromising the reliability of the [outcome of a proceeding] and undermining confidence in it." *Theriault v. State*, 125 A.3d 1163,

2015 ME 137, ¶ 25; *see also Fretwell*, 506 U.S. at 372 ("[T]he 'prejudice' component of the Strickland test . . . focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair."). Oftentimes, this can be demonstrated by projecting what might have happened had counsel performed adequately. But in some cases, counsel's deficient performance completely undermines the validity of a supposedly adversarial proceeding as a mechanism for determining facts. In these rare circumstances, it is unnecessary to attempt to reconstruct what *might* have happened because what *did* happen produced a record and set of facts lacking all indicia of trustworthiness. *See*, *e.g.*, *Williams v. Taylor*, 529 U.S. 362, 391 (2000) ("It is true that while the *Strickland* test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims, there are situations in which the overriding focus on fundamental fairness may affect the analysis."); *cf. United States v. Cronic*, 466 U.S. 648, 658 (1984) (holding in a case decided the same day as *Strickland* that in some cases, the circumstances were "so likely to prejudice the accused" that prejudice does not have to be proven.). In certain instances, the question the reasonable probability test was designed to answer—whether or not the proceeding was fundamentally fair—has already been answered. *See Griffin v. Aiken*, 775 F.2d 1226, 1229 (4th Cir. 1985) ("[E]ven though it is to be presumed that counsel is competent, certain circumstances may indicate a breakdown in the adversarial process which will justify a presumption of ineffectiveness without inquiry into counsel's actual performance at trial.")

¶ 51 In these circumstances, efforts to project what might have happened had counsel performed adequately will be based on little more than an appellate court's speculative guesswork. The reliability of this retrospective exercise is itself predicated on there being a reasonably well-developed record and established set of facts, which must be elicited and determined by the trial court. *See State v. Smith*, 278 N.C. 36, 41 (1971) (explaining that the trial court "sees the witnesses, observes their demeanor as they testify and by reason of his more favorable position, he is given the responsibility of discovering the truth"). Assessing prejudice by projecting what might have happened based on a record and set of facts developed over the course of multiple hearings where a party repeatedly received deficient representation places that party "in an impossible bind," because counsel's performance is "so deficient that it deprived her of the opportunity to develop a record which would support her claim of prejudice[.]" *In re Z.M.T.*, 379 N.C. 44, 2021-NCSC-121, ¶ 20 (Earls, J., dissenting). Because "[t]he assistance of counsel is often a requisite to the very existence of a fair [proceeding]," *Argersinger*

v. Hamlin, 407 U.S. 25, 31 (1972), it is perverse to deny a party's IAC claim on the basis of a retrospective review of a record and set of facts produced in a set of proceedings where counsel's performance was wholly deficient.

¶ 52 Moreover, the majority's conclusion that it is routine and, indeed, preferable to resolve IAC claims by presuming that the representation was ineffective and jumping right to the question of whether there was a sufficient showing of prejudice disserves justice and the interests IAC doctrine aims to protect. *See United States v. DiTommaso*, 817 F.2d 201, 215 (2d Cir. 1987) ("The benchmark for judging any such claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."). Resolving IAC claims by explaining why counsel's performance was constitutionally inadequate does not require us to inappropriately "grade counsel's performance"; rather, our refusal to do so constitutes an abandonment of our obligation to ensure the fair administration of justice. In our adversarial system, due process demands that parties have adequate opportunities to avail themselves of the advice of counsel and the services of an advocate who will present to a neutral fact finder the evidence and arguments that support their case. *Cf. Herring v. New York*, 422 U.S. 853, 862 (1975) ("The very premise of our adversary system of . . . justice is that partisan advocacy on both sides of a case will best promote the ultimate objective" of discerning the truth). Concluding that justice has been done in the absence of a meaningful adversarial process, based upon our own speculation that the result of a reliable process would not have been different, when our projection of what the result would have been is itself based upon the record and facts developed during a wholly untrustworthy proceeding, is little more than a convenient and comforting fiction.

¶ 53 The second problem with the majority's prejudice analysis is its refusal to meaningfully engage respondent-mother's cumulative prejudice claim. Under the cumulative prejudice doctrine, "instances of counsel's deficient performance may be aggregated to prove cumulative prejudice." *State v. Allen*, 378 N.C. 286, 2021-NCSC-88, ¶ 42. Cumulative prejudice may arise in circumstances such as this one where counsel performs deficiently numerous times or in various ways while representing a party. *See Cooper v. Fitzharris*, 586 F.2d 1325, 1333 (9th Cir. 1978) ("If counsel is charged with multiple errors at trial, absence of prejudice is not established by demonstrating that no single error considered alone significantly impaired the defense [because] prejudice may result from the cumulative impact of multiple deficiencies."). Because legal proceedings are dynamic, it is often difficult to isolate the effects of any

one instance of deficient performance—counsel's failure to provide adequate representation at multiple points in a proceeding might fundamentally alter the course of that proceeding, even though the harm to a party's interests cannot easily or entirely be traced to a single instance.

¶ 54 In stating that it "need not address whether cumulative prejudice must be considered by the trial court" because the trial court's conclusions of law reveal that it "considered cumulative prejudice," the majority implies that it is an open question whether a court must review for cumulative prejudice when a party brings an ineffective assistance of counsel claim alleging multiple discrete instances of deficient performance.[1] But this question was asked and answered in *State v. Allen*, 378 N.C. 286, 2021-NCSC-88. In *Allen*, we explained that a trial court considering an IAC claim raised in a motion for appropriate relief

> must examine whether any instances of deficient performance at discrete moments in the trial prejudiced Allen when considered both individually and cumulatively. We reject the MAR court's erroneous conclusion that cumulative prejudice is unavailable to a defendant asserting multiple IAC claims. . . . [W]e adopt the reasoning of the unanimous Court of Appeals panel which recently concluded that "because [IAC] claims focus on the reasonableness of counsel's performance, courts can consider the cumulative effect of alleged errors by counsel." *State v. Lane*, 271 N.C. App. 307, 316, 844 S.E.2d 32, *review dismissed*, 376 N.C. 540, 851 S.E.2d 367 (2020), *review denied*, 376 N.C. 540, 851 S.E.2d 624 (2020). To be clear, only instances of counsel's deficient performance may be aggregated to prove cumulative prejudice—the cumulative prejudice doctrine is not an invitation to reweigh all of the choices counsel made throughout the course of representing a defendant.

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1. The majority further suggests that because, in their view, respondent-mother did not challenge the trial court's findings of fact or those findings were supported by the evidence, "were we to address this argument, we would be bound to affirm the trial court's conclusion that respondent was not cumulatively prejudiced." However, that is not correct because it completely abdicates our duty as an appellate court to examine whether the findings of fact support the trial court's conclusions of law. *See In re E.H.P.*, 372 N.C. 388, 392 (2019) ("We review a trial court's adjudication under N.C.G.S. § 7B-1111 'to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law.' " (quoting *In re Montgomery*, 311 N.C. 101, 111 (1984) (citing *In re Moore*, 306 N.C. 394, 404 (1982)).

Id. ¶ 42 (footnote omitted). We further explained that "[o]ur decision to recognize cumulative prejudice claims is based upon our own interpretation of *Strickland* and IAC doctrine," establishing that cumulative prejudice doctrine applies to *all* IAC claims derived from *Strickland*. *Id.* ¶ 42 n.8. The dissenting opinion in *Allen* disputed the majority's interpretation of our caselaw and this doctrine, but the dissenting opinion acknowledged that, post-*Allen*, cumulative prejudice doctrine would be part of "North Carolina's jurisprudence on ineffective assistance of counsel claims," *Id.* ¶ 80 (Berger, J., dissenting). *Allen* is controlling precedent, and this Court is "bound by prior precedent [under] the doctrine of stare decisis." *In re O.E.M.*, 379 N.C. 27, 2021-NCSC-120, ¶ 12 (quoting *Bacon v. Lee*, 353 N.C. 696, 712 (2001)). Under *Allen*, a trial court is required to review a party's IAC claim for cumulative prejudice, notwithstanding the majority's suggestions to the contrary. This Court must do the same on appeal, where the trial court's legal determination that a party has not demonstrated cumulative prejudice is reviewed de novo. *State v. Clark*, 380 N.C. 204, 2022-NCSC-13, ¶ 31 ("Whether a defendant was denied the effective assistance of counsel is a question of law that is reviewed de novo.").

¶ 55 Applying the proper prejudice standard to the facts of this case, I would conclude that respondent-mother has demonstrated she was prejudiced by her counsel's multiple instances of deficient performance. This case differs significantly from the typical case involving an IAC claim in a termination proceeding. In most cases, an appellate court reviews a claim that a respondent-parent received ineffective assistance in a termination proceeding alone, not that the parent received ineffective assistance during the underlying juvenile proceedings leading up to the termination hearing. *See*, *e.g.*, *In re M.Z.M.*, 251 N.C. App. 120, 124 (2016) ("Respondent-mother claims she received ineffective assistance of counsel ('IAC') at the termination hearing."). In those types of cases, an appellate court can conduct a prejudice analysis based on the record and set of facts developed and determined by the trial court during the underlying proceedings, which allow the appellate court to assess with a reasonable degree of certainty the probable impact of counsel's deficient performance at the termination hearing.

¶ 56 This case is different. In this case, respondent-mother's counsel failed to secure her presence in court on numerous occasions, failed to maintain ongoing communication with her during the course of proceedings, failed to file a responsive pleading to DSS's termination motion, failed to advocate on respondent-mother's behalf during the underlying juvenile proceedings, and failed to raise any defense at the termination hearing. These actions and omissions fall far short of what is necessary

to provide a respondent-parent with adequate representation. While the precise standard for adequate performance might vary depending upon the context and nature of a given proceeding, given the stakes involved for parents in juvenile matters, adequate representation would generally require counsel to do things like

> - Communicate regularly with clients (at least monthly and after all significant developments or case changes) and in-person when possible;
>
> . . . .
>
> - Thoroughly prepare for and attend all court hearings and reviews.
> - Thoroughly prepare clients for court, explain the hearing process and debrief after hearing are complete to make sure clients understand the results. For children this must be done in a developmentally appropriate way.
>
> . . . .
>
> - Conduct rigorous and complete discovery on every case.
> - Independently verify facts contained in allegations and reports.
> - Have meaningful and ongoing conversation with all clients about their strengths, needs, and wishes.
>
> . . . .
>
> - Work with every client to identify helpful relatives for support, safety planning and possible placement.
> - Attend and participate in case planning, family group decision-making and other meetings a client may have with the child welfare agency.
> - Work with clients individually to develop safety plan and case plan options to present to the court.
> - File motions and appeals when necessary to protect each client's rights and advocate for his or her needs.

United States Department of Health and Human Services, Administration on Children, Youth and Families, *High Quality Legal Representation for All Parties in Child Welfare Proceedings* 13 (2017). Respondent-mother did not receive adequate representation under the circumstances of this case.

¶ 57 These repeated failures deprived respondent-mother of a fundamentally fair termination proceeding and deprive this Court of a record and set of facts that allow us to reasonably assert respondent-mother's rights would have been terminated even if she had received adequate representation. These basic legal principles are usefully illustrated by a case out of Oregon, *In State ex rel. State Office for Services to Children & Families v. Thomas (In re Stephens)*, 170 Or. App. 383 (2000). The facts of *In re Stephens* are very similar to this case. In *In re Stephens*, the father failed to appear for the termination hearing. He was in a residential treatment center at the time of the hearing, and his attorney did not obtain a subpoena for his attendance or notify personnel at the center about the need to have the father at the hearing. Although counsel was present at the hearing, he made no opening statement except to say that his client could be a good father and was in treatment. He made no closing argument. He did not call witnesses, offer any exhibits, or cross-examine most of the witnesses. Counsel also admitted that he was not prepared for trial, in part, because of the father's absence. The court concluded that the attorney's lack of preparation and failure to advocate any theory for the father rendered his performance inadequate. The court also, on that record, found that his counsel's failure to defend his interests was prejudicial:

> Essential to our conclusion is the fact that the trial court was not given the opportunity to judge the credibility of the father's case or his evidence, whatever father's case and evidence may in fact be. . . . In a situation, as here, where father wanted to put on a case, where there is some credible evidence that father could be a resource for child, and where counsel has not effectively advocated *any* theory of father's case, father has not been heard. Accordingly, we will not conclude that the result would have inevitably been the same.

In re Stephens, 170 Or. App. at 395–96; *see also In re J.J.L.*, 2010 MT 4, 355 Mont. 23, 223 P.3d 921 (2010) (concluding that trial counsel rendered deficient performance by failing to object to hearsay evidence, making no other objections, asking no questions on cross-examination, and

not meeting with client prior to termination hearing). For similar reasons, the North Dakota Supreme Court has held that failure to provide counsel to an indigent parent in a juvenile proceeding may *never* be harmless error:

> We are skeptical that the denial of counsel to an indigent parent in an adoption proceeding which results in the termination of parental rights can ever be "harmless," under any standard. It is, after all, an axiom in criminal cases that counsel enables an accused to procure a fair trial, and the formality of these termination and adoption proceedings, along with their substantial threat to a fundamental interest of the parent, is not so different from those in a criminal case.

Matter of Adoption of K.A.S., 499 N.W.2d 558, 567 (N.D. 1993) (citation omitted). Given how wholly inadequate counsel's performance was in this case, the logic should apply.

¶ 58 Here, for example, because respondent-mother was in and out of jail throughout the course of these proceedings, an assessment of her progress on her case plan and the applicability of the asserted grounds for termination required an assessment of the constraints imposed by her incarceration. *See In re K.N.*, 373 N.C. 274, 283 (2020) ("[R]espondent's incarceration, by itself, cannot serve as clear, cogent, and convincing evidence of neglect. Instead, the extent to which a parent's incarceration or violation of the terms and conditions of probation support a finding of neglect depends upon an analysis of the relevant facts and circumstances."). But because counsel never raised the issue at a permanency planning hearing, and because respondent-mother was never brought to court to raise the issue or present factual evidence herself, the trial court never considered whether the terms of respondent-mother's case plan needed to be adapted in view of the services available to her in jail. Because counsel did not file an answer to the termination motion and did not advocate for respondent-mother at the termination hearing, the trial court never examined the extent to which the existence of grounds for termination resulted from the fact of respondent-mother's incarceration alone. *In re M.A.W.*, 370 N.C. 149, 153 (2017) ("Our precedents are quite clear—and remain in full force—that incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision.") (cleaned up). The opportunity to create a record that could support the claim that the outcome of the termination hearing might have been different was lost due to counsel's deficient performance at

all stages of these proceedings. In no meaningful sense do these circumstances establish that the termination of respondent-mother's parental rights resulted from "a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687.

II. Respondent-mother's challenge to the trial court's findings of fact

¶ 59 In addition to the majority's improper application of the prejudice standard, the majority also errs in sidestepping respondent-mother's challenge to the trial court's findings of fact by adopting a strained, unnecessary, and formalistic reading of the argument raised in her brief. According to the majority, respondent-mother failed to challenge any of the findings of fact the trial court actually entered because the trial court did not enter the finding respondent-mother purported to challenge, the finding "that there was no evidence that could have been presented to alter the result of the termination proceeding." It is correct that there is no finding precisely stating "that there was no evidence that could have been presented to alter the result of the termination proceeding" in those exact words. But the trial court did find that "[i]n the absence of any showing of evidence or testimony that could have been presented, the court finds that, even if respondent-mother had been present and available at every hearing throughout the pendency of the underlying case, the outcome of the termination hearing would have been the same." Substantively, there is no difference between the finding respondent-mother challenges and the finding the trial court entered. Both mean exactly the same thing: that, in the trial court's view, respondent-mother had failed to note any evidence that "could have been presented" during the termination proceeding (or underlying juvenile proceeding) that would have changed its ultimate outcome.

¶ 60 There is no requirement in our rules of appellate procedure stating that appellants must list the specific findings of fact being challenged using the precise words utilized by the factfinder in order to challenge findings of fact on appeal. We have never before imposed such a requirement in our caselaw. There is good reason not to. This Court has moved away from overly technical rules of appellate procedure in recent years, amending Rule 10 to eliminate the requirement that litigants must list specific "exceptions" and "assignments of error" to properly present an issue on appeal. *See Malone-Pass v. Schultz*, 868 S.E.2d 327, 2021-NCCOA-656, ¶ 15 (describing changes to Rules of Appellate Procedure effective as of October 2009). Consistent with this more reasonable approach, and based on the text of the current Rule 10, we have held that a party preserves an issue for appellate review by making a

general objection when "what action is being challenged and why the challenged action is thought to be erroneous . . . are 'apparent from the context[.]' " *State v. McLymore*, 380 N.C. 185, 2022-NCSC-12, ¶ 17. We should utilize the same approach in this context. Unchallenged findings of fact are always binding on appeal, but if it is "apparent from the context" that a party is challenging a particular finding of fact, we should not evade our obligation to review the trial court's findings to determine if they are supported by the record evidence.

III. Conclusion

¶ 61 Once again, this Court's decision to deny a respondent-parent's claim that she received ineffective assistance of counsel in a juvenile proceeding "gives short shrift to an important guarantor of the fairness of our juvenile system." *In re Z.M.T.*, 379 N.C. 44, 2021-NCSC-121, ¶ 21 (Earls, J., dissenting). Although I recognize the State's interest in protecting the welfare of the children subject to these proceedings and the children's concomitant need for permanency, the juvenile system suffers when we refuse to correct the erosion of rights guaranteed to parents in juvenile proceedings. The record in this case demonstrates that respondent-mother's counsel's representation in this instance was so deficient as to undermine the validity and reliability of the juvenile and termination proceedings entirely. Accordingly, I would reverse the order terminating respondent-mother's parental rights and remand for further proceedings.

IN RE B.F.N.

[381 N.C. 372, 2022-NCSC-68]

IN THE MATTER OF B.F.N. AND C.L.N.

No. 261A21

Filed 17 June 2022

Termination of Parental Rights—grounds for termination—willful abandonment—neglect by abandonment—termination petitions denied—insufficiency of findings

The trial court's orders denying petitioner-mother's petitions to terminate respondent-father's parental rights in the children born of their marriage lacked sufficient findings of fact—both to support denial of the petitions and to permit meaningful appellate review—and therefore the orders were vacated and remanded for additional findings and conclusions. Specifically, for the ground of willful abandonment, the trial court failed to identify the determinative six-month period, failed to address whether respondent had the ability to seek modification of an order requiring him to have no contact with his children during the determinative period, and, with one exception, considered respondent's "actions to improve himself" occurring only outside the determinative period; for the ground of neglect based on abandonment, the trial court failed to make any findings.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) (2019) from orders entered on 18 May 2021 by Judge William B. Sutton Jr. in District Court, Sampson County. This matter was calendared for argument in the Supreme Court on 13 May 2022 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Gregory T. Griffin for petitioner-appellant mother.

Jeffrey L. Miller for respondent-appellee father.

HUDSON, Justice.

¶ 1 Petitioner, the mother of C.L.N. (Chip)[1] and B.F.N. (Brad) (collectively, the children), appeals from the trial court's orders denying her petitions to terminate the parental rights of respondent, the children's

1. Pseudonyms are used in this opinion to protect the juveniles' identities and for ease of reading.

biological father. Because trial court's findings of fact do not permit meaningful appellate review and are thus insufficient to support the denial of the termination petitions, we vacate the trial court's orders and remand for further proceedings.

I. Factual and Procedural Background

¶ 2 Petitioner and respondent were married in 2003. Chip was born in 2007, and Brad was born in 2012. The parties divorced in 2015.

¶ 3 On 9 March 2015, a domestic violence protective order (DVPO) was issued against respondent. The trial court found that in March 2015, respondent had placed petitioner in fear of imminent serious bodily injury by threatening to harm her and causing property damage. The trial court concluded that respondent had committed acts of domestic violence against petitioner and that there was a danger of serious and immediate injury to petitioner. Pursuant to the DVPO, respondent was prohibited from assaulting, threatening, abusing, following, harassing, or interfering with petitioner; prohibited from threatening a member of petitioner's family or household; ordered to stay away from petitioner's residence or any place where petitioner receives temporary shelter; ordered to stay away from petitioner's work and "any place [petitioner] may be found"; and prohibited from possessing, receiving, or purchasing a firearm. The terms of the DVPO were in effect until 9 March 2016.

¶ 4 On 12 March 2015, petitioner and respondent entered into a "Confession of Judgment." They agreed that petitioner would have primary custody of the children. Respondent would have secondary joint custody of the children and visitation with the children every first and third weekend of the month and select holidays.

¶ 5 On 21 October 2017, respondent physically assaulted petitioner at a restaurant while the children were present. As a result of the incident, criminal charges were brought against respondent, and on 7 December 2017, respondent was found guilty of assault on a female.

¶ 6 On 11 December 2017, another DVPO was entered against respondent. The trial court found that on 21 October 2017, respondent had intentionally caused serious bodily injury to petitioner by "attacking and assaulting" petitioner. Pursuant to the DVPO, respondent was prohibited from assaulting, threatening, abusing, following, harassing, or interfering with petitioner; prohibited from assaulting, threatening, abusing, following, harassing, or interfering with children residing with or in the custody of petitioner; prohibited from threatening a member of petitioner's family or household; ordered to stay away from petitioner's

residence or any place petitioner receives temporary shelter; ordered to stay away from petitioner's work, the children's school or any place where the children receive day care, and "any other place where [petitioner] is located." Respondent was also ordered to make payments to petitioner for support of the children; prohibited from possessing, receiving, or purchasing a firearm; ordered to surrender firearms, ammunition, and gun permits; and ordered to attend and complete an abuser treatment program. The terms of the order were effective until 11 December 2018. Additionally, temporary custody of the children was granted to petitioner.

¶ 7 On 21 December 2017, the trial court entered an order finding that the children were exposed to a substantial risk of emotional injury caused by respondent, the children were present during acts of domestic violence perpetrated by respondent against petitioner, and respondent had acted in a manner that was not in the best interests of the children and was inconsistent with his constitutional rights as a natural parent. The trial court concluded that respondent was not a fit and proper person to exercise any custody or visitation with the children and that it was in the best interests of the children that petitioner have exclusive custody of them. Accordingly, petitioner was granted the exclusive care, custody, and control of the children, and respondent's rights of secondary joint custody and visitation were terminated.

¶ 8 Respondent was ordered to "remain away" and "not to go around" the children and petitioner, including but not limited to "any place where they may be whether at home, school, church, in any public or private place"; ordered to leave any premises "wherever they may be present"; and prohibited from making "any contact in person and/or by an agent directly or indirectly." Respondent was ordered not to have any contact with petitioner or the children "pending further orders of th[e] court and only upon a motion in the cause being filed by [respondent] alleging that a substantial change of circumstances has occurred and no sooner can such motion be filed then until after one (1) year from the entry of this order." As a condition precedent to respondent filing such a motion, the trial court ordered him to obtain a substance abuse and alcohol assessment and complete all recommended treatment; undergo a psychological examination and attend any recommended counseling; complete at least three consecutive alcohol and drug screens at least one month apart prior to filing any motion; complete certified parenting classes; complete domestic violence prevention classes; and complete an anger management assessment and all recommended treatment and counseling sessions.

¶ 9 On 14 March 2019, the trial court entered an order holding respondent-father in contempt for violating its 21 December 2017 order. The trial court found that respondent had violated the 21 December 2017 order by sending petitioner text messages on 14, 15, and 21 December 2018 requesting to see the children and going to Chip's school and attempting see him on 11 January 2019. The trial court ordered respondent to serve thirty days in the Sampson County Jail. All but one twenty-four-hour period of this sentence was suspended. The 21 December 2017 order remained in effect.

¶ 10 On 10 July 2020, petitioner filed petitions to terminate respondent's parental rights in the children. Petitioner alleged, *inter alia*, that respondent had for a period greater than two years preceding the filing of the petitions willfully failed without justification to pay for the care, support, and education of the children; respondent had "abandoned and neglected" the children and "ha[d] not made any inquiry about the well-being" of the children in over two years; and respondent had willfully abandoned the children for at least six months immediately preceding the filing of the petitions.

¶ 11 On 21 July 2020, respondent filed a motion for modification of child custody seeking joint legal and physical custody of the children. Alternatively, respondent sought "substantial visitation" with the children. On 19 October 2020, respondent filed an answer to the termination petitions, denying many of the allegations.

¶ 12 Following a hearing on 18 March 2021, the trial court entered orders on 18 May 2021 finding that there was "insufficient evidence for th[e] [c]ourt to conclude that grounds exist to terminate the parental rights of the Respondent" and denying the petitions to terminate respondent's parental rights.[2] Petitioner timely appealed to this Court.

II. Analysis

¶ 13 On appeal, petitioner challenges the trial court's conclusion that grounds did not exist to terminate respondent's parental rights in the children. Specifically, she argues the trial court erred in concluding that respondent did not willfully abandon or neglect the children.[3] Based on

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2. Although the trial court entered separate orders denying the petitions to terminate respondent's parental rights in the children, the findings of fact and conclusions of law are identical.

3. Petitioner does not argue on appeal that the evidence supported the termination of respondent's parental rights under N.C.G.S. § 7B-1111(a)(4), as she alleged in the petitions.

the reasons stated herein, we hold that the trial court's findings of fact do not permit meaningful appellate review and are thus insufficient to support the trial court's denial of the termination petitions.

¶ 14 Subsection § 7B-1109(e) provides that the trial court "shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in [N.C.]G.S. [§] 7B-1111 which authorize the termination of parental rights of the respondent." N.C.G.S. § 7B-1109(e) (2021). The burden of proof is upon the petitioner and "all findings of fact shall be based on clear, cogent, and convincing evidence." N.C.G.S. § 7B-1109(f) (2021).

¶ 15 "Should the court determine that circumstances authorizing termination of parental rights do not exist, the court shall dismiss the petition or deny the motion, *making appropriate findings of fact and conclusions [of law]*." N.C.G.S. § 7B-1110(c) (2021) (emphasis added). The trial court is under a duty to "find the facts specially and state separately its conclusions of law thereon, regardless of whether the court is granting or denying a petition to terminate parental rights." *In re K.R.C.*, 374 N.C. 849, 857 (2020) (cleaned up).

> Compliance with the fact-finding requirements of N.C.G.S. §§ 7B-1109(e) and -1110(c) is critical because [e]ffective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated. Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto.

Id. at 858 (alteration in original) (quoting *Quick v. Quick*, 305 N.C. 446, 458 (1982)).

¶ 16 In her first argument, petitioner asserts the trial court erred in determining that "there is insufficient evidence . . . to conclude [respondent] willfully abandoned [the children] due to his actions to improve himself and the clear prohibitions set forth in the [21 December 2017] order" because respondent "could not use the 2017 Order as a complete shield." She contends that respondent had no contact with the children and failed to provide any financial or emotional support for the children

since 2017. Petitioner also claims that respondent failed to fully comply with the requirements of the 21 December 2017 order by refusing to participate in counseling sessions.

¶ 17 Termination of parental rights under N.C.G.S. § 7B-1111(a)(7) requires proof that "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion." N.C.G.S. § 7B-1111(a)(7) (2021). As used in subsection 7B-1111(a)(7), abandonment requires a "purposeful, deliberative and manifest willful determination to forego all parental duties and relinquish all parental claims to [the child]." *In re A.G.D.*, 374 N.C. 317, 319 (2020) (alteration in original) (quoting *In re N.D.A.*, 373 N.C. 71, 79 (2019)). "[I]f a parent withholds his presence, his love, his care, the opportunity to display filial affection, and willfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *Pratt v. Bishop*, 257 N.C. 486, 501 (1962). The willful intent element "is an integral part of abandonment" and is determined according to the evidence before the trial court. *Id.* "[A]lthough the trial court may consider a parent's conduct outside the six-month window in evaluating a parent's credibility and intentions, the 'determinative' period for adjudicating willful abandonment is the six consecutive months preceding the filing of the petition." *In re N.D.A.*, 373 N.C. at 77 (quoting *In re D.E.M.*, 257 N.C. App. 618, 619 (2018)).

¶ 18 Because the termination petitions were filed on 10 July 2020, the determinative six-month period in the present case is from 10 January 2020 to 10 July 2020. The trial court concluded that there was insufficient evidence to establish that respondent willfully abandoned the children "due to his actions to improve himself and the clear prohibitions set forth in the [21 December 2017] order."[4] However, outside the finding that he had been employed "since approximately 2012," the remaining findings detailing respondent's "actions to improve himself" refer to events that occurred outside the relevant six-month period. For instance, the trial court found respondent completed a psychological evaluation in November 2019, an anger management and batterer

4. Although the trial court labeled this as a finding of fact, a determination that respondent did not willfully abandon the children is a conclusion of law, involving the application of legal principles. *See State v. Sparks*, 362 N.C. 181, 185 (2008) ("[A]ny determination requiring . . . the application of legal principles is more properly classified [as] a conclusion of law." (quoting *In re Helms*, 127 N.C. App. 505, 510 (1997))). "[F]indings of fact [which] are essentially conclusions of law . . . will be treated as such on appeal[,]" and we will treat them as such in our review of the instant matter. *Id.* (second and third alterations in original) (quoting *Harris v. Harris*, 51 N.C. App. 103, 107, *disc. rev. denied*, 303 N.C. 180 (1981)).

intervention program in August 2018, outpatient substance abuse counseling in October 2019, and parenting classes in July 2019, but none of these efforts transpired during the determinative six-month period. "The inadequacy of the trial court's findings is further displayed by its failure to identify 'the determinative six-month period' governing its abandonment inquiry." *In re K.R.C.*, 374 N.C. at 861 (quoting *In re C.B.C.*, 373 N.C. 16, 23 (2019)).

¶ 19 Moreover, the trial court's findings regarding the limitations of the 21 December 2017 order on respondent's efforts are insufficient to support a determination that he did not willfully abandon the children. The trial court found that the 21 December 2017 order terminated respondent's rights to secondary joint custody and visitation with the children, ordered him to "to remain away from the minor children and [petitioner] and not go around them wherever [petitioner] or the minor children shall be located[,]" and prohibited him "from making any contact in person and/or by an agent directly or indirectly." However, respondent was free to seek modification of the order by alleging a substantial change in circumstances any time after 21 December 2018.

¶ 20 As a condition precedent to the court considering any motion in the cause filed by respondent, respondent was ordered to obtain a substance abuse and alcohol assessment and complete any recommended treatment, complete a psychological examination and attend any recommended counseling, complete three consecutive alcohol and drug screens at least one month apart, complete domestic violence prevention classes, and complete an anger management assessment and any recommended treatment and counseling. As previously noted, the trial court made findings that respondent complied with many of these requirements. Nonetheless, the court's findings fail to address whether respondent had the ability to seek modification of the 21 December 2017 order during the six-month determinative period. Respondent's ability or inability to seek modification of the 21 December 2017 order during this period would be relevant in determining the willfulness of his acts or omissions. *See In re E.H.P.*, 372 N.C. 388, 394 (2019) (rejecting an argument that a no-contact provision in a temporary custody judgment prevented the respondent from contacting his children during the relevant six-month period when the respondent made no attempt to modify the terms of the temporary custody judgment which was "by definition provisional, and . . . expressly contemplated the possibility that the no-contact provision would be modified in a future order"); *In re I.R.M.B.*, 377 N.C. 64, 2021-NCSC-27, ¶ 19 (rejecting an argument that a restraining order precluded contact with the respondent's child

during the determinative six-month period where the respondent was aware of his ability to seek legal custody and visitation rights and how to obtain such relief despite the limitations of the order but failed to do so). Likewise, the trial court's findings fail to address other indications that respondent sought to fulfill his parental duties during the applicable six-month period.

¶ 21 In her second argument, petitioner argues that the trial court erred in determining "there is insufficient evidence to suggest either current neglect or a likelihood of future neglect" by respondent and argues that this Court is unable to conduct meaningful appellate review when the trial court's findings are insufficient to demonstrate it considered terminating respondent's parental rights based upon neglect by abandonment.

¶ 22 According to N.C.G.S. § 7B-1111(a)(1), a trial court is entitled to terminate a parent's parental rights in a child on the basis of neglect if that child's "parent, guardian, custodian, or caretaker . . . [d]oes not provide proper care, supervision, or discipline[;] [h]as abandoned the juvenile[;] . . . [or c]reates or allows to be created a living environment that is injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2021). "In determining whether a parent's parental rights in a child are subject to termination on the basis of neglect, the parent's fitness to care for his or her child must be determined as of the date of the termination hearing, an event that is frequently held after the child has been removed from the parent's custody." *In re D.T.H.*, 378 N.C. 576, 2021-NCSC-106, ¶ 19. In that scenario, "[t]he trial court must consider evidence of changed conditions . . . in light of the history of neglect by the parents and the probability of a repetition of neglect." *In re Ballard*, 311 N.C. 708, 714 (1984) (quoting *In re Wardship of Bender*, 170 Ind. App. 274, 285, 352 N.E.2d 797, 804 (1976)). "On the other hand, however, this Court has recognized that the neglect ground can support termination without use of the two-part *Ballard* test if a parent is presently neglecting their child by abandonment." *In re D.T.H.*, ¶ 19 (cleaned up).

¶ 23 A trial court has the authority to terminate a parent's parental rights in a child for neglect based upon abandonment in the event the trial court finds that the parent's conduct demonstrates a "willful neglect and refusal to perform the natural and legal obligations of parental care and support." *Pratt*, 257 N.C. at 501. In order to terminate parental rights on this ground, "the trial court must make findings that the parent has engaged in conduct which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child as of the time of the termination hearing." *In re N.D.A.*, 373 N.C. at 81 (cleaned up). In determining whether a parent has neglected his or her child by

abandonment for purposes of N.C.G.S. § 7B-1111(a)(1), the relevant time period "is not limited to the six consecutive months immediately preceding the filing of the termination petition." *Id.* at 81. "[A] trial court may consider a parent's conduct over the course of a more extended period of time . . . ." *Id.* at 81–82 (citations omitted).

¶ 24 In the orders denying the termination petitions, the trial court found that respondent had been in a relationship with his fiancée who testified about the absence of domestic violence and incidents of shouting and anger by respondent; respondent had a good relationship with his fiancée's children; respondent had never been physically violent toward Chip or Brad; respondent had taken steps to improve himself, including completing parenting, domestic violence, and substance abuse classes; and there was no evidence respondent had engaged in any violent crimes or dangerous behaviors since the 2017 incident involving petitioner. Ultimately, the trial court determined that

> while the incident of domestic violence towards [petitioner] at the Bojangles in the presence of the [children] and other acts that occurred prior to the December 21, 2017 Order support a finding of neglect by [respondent], there is insufficient evidence to suggest either current neglect or a likelihood of future neglect by [respondent].

¶ 25 However, despite allegations that respondent had "abandoned and neglected" the children and "ha[d] not made any inquiry about the well-being" of the children in over two years, the trial court's findings fail to offer an assessment regarding the issue of whether respondent neglected the children by abandonment. This Court has previously held that "when the trial court denies a petition at the adjudicatory stage pursuant to N.C.G.S. § 7B-1110(c), the order must allow for appellate review of the trial court's evaluation of *each and every* ground for termination alleged by the petitioner." *In re K.R.C.*, 374 N.C. at 864. Without findings addressing whether respondent's acts or omissions amounted to "wil[l]ful neglect and refusal to perform the natural and legal obligations of parental care and support[,]" *Pratt*, 257 N.C. at 501, this Court is precluded from conducting meaningful appellate review on this ground.

III. Conclusion

¶ 26 For the reasons set forth above, we hold that the trial court's findings of fact are insufficient to support its denial of petitioner's termination-of-parental-rights petitions. As a result, we vacate the trial court's 18 May 2021 orders and remand the matter to the trial court for entry of

additional findings of fact and conclusions of law. On remand, we leave to the discretion of the trial court whether to hear additional evidence. *See, e.g.*, *In re K.R.C.*, 374 N.C. at 865.

VACATED AND REMANDED.

IN THE MATTER OF D.R.J.

No. 147A21

Filed 17 June 2022

1. Termination of Parental Rights—collateral attack—initial custody determination—failure to appeal—not facially void for lack of jurisdiction

In his appeal from the trial court's order terminating his parental rights in his daughter, respondent-father could not collaterally attack the initial custody determination adjudicating his daughter as neglected and placing her in the department of social services' custody. Respondent's failure to appeal the initial custody determination precluded his collateral attack, and the exception regarding orders that are facially void for lack of jurisdiction did not apply.

2. Termination of Parental Rights—grounds for termination—notice—sufficiency of allegations

Where the department of social services' motion to terminate respondent-father's parental rights specifically cited only N.C.G.S. § 7B-1111(a)(3) and (a)(6) as grounds for terminating his parental rights, the trial court erred by adjudicating the existence of the grounds in N.C.G.S. § 7B-1111(a)(1), (a)(2), and (a)(7). A sentence in the motion under the paragraph citing N.C.G.S. § 7B-1111(a)(6) —even when coupled with prior orders incorporated by reference— alleging that the "parents have done nothing to address or alleviate the conditions which led to the adjudication of this child as a neglected juvenile" did not adequately allege statutory language to provide notice of the grounds in N.C.G.S. § 7B-1111(a)(1) or (a)(2), and the allegation in the motion referencing N.C.G.S. § 7B-1111(a)(7) with regard to the children's mother could not provide notice that respondent's parental rights were subject to termination on that ground.

3. Termination of Parental Rights—grounds for termination—failure to pay a reasonable portion of the cost of care—dependency—sufficiency of evidence and findings

The trial court erred in determining that the grounds of failure to pay a reasonable portion of the cost of care (N.C.G.S. § 7B-1111(a)(3)) and dependency (N.C.G.S. § 7B-1111(a)(6)) existed to support termination of respondent-father's parental rights where insufficient evidence of each ground was presented before the trial court and therefore the factual findings were insufficient. Specifically, for the ground in N.C.G.S. § 7B-1111(a)(3), the single factual finding recited the statutory language, and there was no evidence or finding regarding the cost of the child's care or respondent's ability to pay; for the ground in N.C.G.S. § 7B-1111(a)(6), the trial court's single factual finding failed to address the availability of an alternate placement option, and no evidence was presented on the matter.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) (2019) from orders entered on 3 March 2021 by Judge Hal Harrison in District Court, Avery County. This matter was calendared in the Supreme Court on 13 May 2022 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Stephen M. Schoeberle for petitioner-appellee Avery County Department of Social Services.

Matthew D. Wunsche for appellee Guardian ad Litem.

Parent Defender Wendy C. Sotolongo, by Assistant Parent Defender Jacky Brammer, for respondent-appellant father.

MORGAN, Justice.

¶ 1 Respondent-father appeals the trial court order terminating his parental rights to "Dana," a minor female child born in May 2010.[1] The order also terminated the parental rights of Dana's mother, but the mother is not a party to this appeal. We reverse the trial court's order which terminates respondent-father's parental rights.

1. We use a pseudonym to protect the identity of the minor child and for ease of reading.

I. Factual and Procedural Background

¶ 2 After receiving reports in June 2018 and August 2018 concerning the mother's drug use and the commission of violence in the presence of the juvenile Dana, the Avery County Department of Social Services (DSS) filed a juvenile petition on 27 August 2018 alleging that Dana was a neglected juvenile. On 4 October 2018, the trial court entered an order adjudicating Dana to be a neglected juvenile based on stipulations by the parents to the following facts as alleged in the juvenile petition:

> [DSS] became involved with this child on June 28, 2018 with a report of drug use by [the mother]. [The mother] agreed to complete a drug screen for the social worker on or about August 3, 2018, which came back positive for methamphetamine, amphetamine, Benzodiazepam and Lorazapam [*sic*]. On August 13, 2018, DSS received another report that [the mother] and her boyfriend (not the Respondent father herein) had gotten into an argument over drugs in the presence of the child. Due to ongoing concerns with these reports as well as drug use by the Respondent father, DSS and the parents agreed the child should reside with the maternal grandmother[.]

As an interim disposition, the trial court ordered that Dana remain in the care of her maternal grandmother.

¶ 3 On 20 October 2018, prior to the disposition hearing on 25 October 2018, DSS received a report that Dana had been sexually abused by the maternal step-grandfather. On the date of the disposition hearing, DSS obtained nonsecure custody of Dana and placed her in a licensed foster home. In the dispositional order entered on 28 November 2018, the trial court found that respondent-father was ordered previously to sign and complete a case plan, but that he had not done so. The trial court directed that Dana remain in DSS custody. In the subsequent 25 January 2019 permanency planning order, the trial court set the primary plan as reunification with a concurrent plan of custody or guardianship with a suitable adult.

¶ 4 Respondent-father entered into a case plan on 26 October 2018 which required him to complete a mental health and substance abuse assessment, to follow all of the resulting recommendations, and to submit to drug screens prior to visitation with Dana. The case plan was subsequently modified several times in order to include the completion of parenting classes, as well as additional substance abuse

counselling and outpatient treatment for alcohol addiction. Despite respondent-father's initial progress in addressing his substance abuse issues in the 16 September 2020 permanency planning order, the trial court made findings of fact which showed that respondent-father's progress with his case plan had stalled. The trial court relieved DSS of its efforts toward the reunification of respondent-father with the juvenile Dana and changed the permanent plan to adoption with a concurrent plan of custody or guardianship with a suitable adult.

¶ 5 DSS filed a motion to terminate parental rights of respondent-father on 30 September 2020, advancing these allegations as grounds for termination:

> A. Per G.S. 7B-1111(a)(3) neither parent has not [*sic*] paid any consistent support for the minor child, the juvenile having been placed in the custody of [DSS] for a continuous period of six months next preceding the filing of the petition, since the final Adjudication and Dispositional Order was entered. Both parents have willfully failed for such a period to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so, in that neither parent is disabled, is able to work, and has paid nothing towards the cost of care of the minor child during that period of time.
>
> B. Per G.S. 7B-1111(a)(6) both parents are incapable of providing for the proper care and supervision of the juvenile such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and there is a reasonable probability that such incapability will continue for the foreseeable future. Neither parent has provided for the financial or housing needs of the child since the child came into the custody of [DSS], and neither is prepared to do so now. The parents have done nothing to address or alleviate the conditions which led to the adjudication of this child as a neglected juvenile[.][2]

¶ 6 At the conclusion of the termination hearing on 4 February 2021, the trial court announced that the evidence supported the termination

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2. The motion to terminate parental rights included an additional allegation, pursuant to N.C.G.S. § 7B-1111(a)(7), that grounds existed to terminate only the mother's parental rights due to abandonment.

of respondent-father's parental rights under N.C.G.S. § 7B-1111(a)(6). In the termination order entered on 3 March 2021, the trial court determined that grounds existed to terminate respondent-father's parental rights under N.C.G.S. § 7B-1111(a)(3), (6), and (7). The trial court rendered findings of fact in its decision which mirrored the language in DSS's termination motion. The trial court also made findings related to respondent-father's progress toward completing his case plan and his efforts toward reunification with Dana. Based on the findings of fact, the trial court reached the following conclusions of law related to the alleged grounds for termination of parental rights:

> 2. Grounds exist for the termination of the parental rights of the Respondent [p]arents;
>
> 3. [Dana] has been adjudicated a neglected juvenile and there remains a strong likelihood of a repetition of neglect if [she] was returned to either parent;
>
> 4. [Dana] has been left in foster care or other placement for more than one year without there being any reasonable progress made under the circumstances to correct conditions leading to [her] removal;
>
> 5. The parents have willfully abandoned [Dana] by failing to make reasonable efforts at completing a case plan in a timely manner, and not addressing the problems leading to removal of [Dana];
>
> . . . .
>
> 8. [DSS] has shown by clear, cogent and convincing evidence that the grounds exist to terminate the parental rights of the Respondent parents as more specifically set forth herein.
>
> . . . .
>
> 10. That grounds exist pursuant to N.C.G.S. §7B-1111 for the termination of the parental rights of the Respondent parents.

The trial court ultimately concluded that it was in the juvenile Dana's best interests to terminate the parental rights of respondent-father, and thereupon terminated respondent-father's parental rights. Respondent-father appeals.

II. Arguments on Appeal

¶ 7 Respondent-father collaterally attacks the initial custody determination. He also challenges both the trial court's adjudication of grounds for termination of his parental rights and the trial court's conclusion of the best interests of the child. We address each argument in turn.

A. Initial Determination of Custody

¶ 8 **[1]** Respondent-father first argues that, as the parent who did not commit the alleged wrongdoing which led to the juvenile Dana being placed in DSS custody, he was "unfairly denied custody" of Dana at the outset of the case because the trial court never found that he was unfit or that he acted inconsistently with his constitutionally protected status. Respondent-father contends that Dana should have been placed in his care upon her removal without a requirement for his compliance with a case plan.

¶ 9 Dana was adjudicated as neglected based upon the parents' stipulation to facts which were alleged in the juvenile petition. At the disposition hearing, the trial court determined that it was in Dana's best interests for DSS to have custody of the juvenile and ordered the agency to assume custody.

¶ 10 Respondent-father had a right to appeal the adjudication and dispositional orders, *see* N.C.G.S. § 7B-1001(a)(3) (2021) (providing the right to appeal "[a]ny initial order of disposition and the adjudication order upon which it is based" to the Court of Appeals), but he failed to do so. Such failure to appeal "generally serves to preclude a subsequent collateral attack . . . during an appeal of a later order terminating the parent's parental rights[,]" *In re A.S.M.R.*, 375 N.C. 539, 544 (2020),except that a collateral attack on an adjudication order or a dispositional order may be appropriate on appeal of an order terminating parental rights when said order "is void on its face for lack of jurisdiction[.]" *Id.* at 543 (quoting *In re Wheeler*, 87 N.C. App. 189, 193–94 (1987)).

¶ 11 Respondent-father does not contend that either the adjudication order or the dispositional order is void, and we conclude that neither of the trial court's orders is void on its face for lack of jurisdiction. Because respondent-father failed to appeal the adjudication and dispositional orders, they remain valid and binding, and respondent-father is precluded from instituting a collateral attack on the trial court's custody determination in this appeal from the tribunal's order which terminated his parental rights.

B. Motion to Terminate Parental Rights

¶ 12 **[2]** Respondent-father next challenges DSS's motion to terminate his parental rights to the child Dana, contending that the motion insufficiently alleges the grounds that the trial court found to exist in order to terminate his parental rights in Conclusions of Law 3, 4, and 5 of the trial court's order. A motion to terminate parental rights must include, *inter alia*, "[f]acts that are sufficient to warrant a determination that one or more of the grounds for terminating parental rights exist." N.C.G.S. § 7B-1104(6) (2021). "While there is no requirement that the factual allegations be exhaustive or extensive, they must put a party on notice as to what acts, omissions or conditions are at issue." *In re B.C.B.*, 374 N.C. 32, 34 (2020) (quoting *In re Hardesty*, 150 N.C. App. 380, 384 (2002)).

¶ 13 In this case, the termination of parental rights motion alleged grounds for the termination of respondent-father's parental rights based on his alleged failure to pay reasonable support for Dana's care and dependency. *See* N.C.G.S. § 7B-1111(a)(3), (6) (2021). The trial court's Conclusions of Law 3, 4, and 5, as set forth above, correspond to the statutory grounds for termination based on neglect, willful failure to make reasonable progress, and willful abandonment. *See* N.C.G.S. § 7B-1111(a)(1), (2), (7) (2021). Respondent-father asserts that the "termination motion did not allege grounds (a)(1) and (a)(2) at all or ground (a)(7) for [respondent-father], much less any specific facts to support" those grounds; therefore, these grounds for termination "cannot be adjudicated and should be disregarded."

¶ 14 The guardian ad litem (GAL) concedes that the termination motion specifically cited only N.C.G.S. § 7B-1111(a)(3) and (a)(6) as grounds to terminate respondent-father's parental rights. However, the GAL contends that the motion contained sufficient factual allegations to provide respondent-father with adequate notice that his parental rights could be terminated under N.C.G.S. § 7B-1111(a)(1) and (a)(2) because "[w]ithin the paragraphs containing those citations" to (a)(3) and (a)(6) "the motion states: 'The parents have done nothing to address or alleviate the conditions which led to the adjudication of this child as a neglected juvenile.' " The GAL further submits that the motion to terminate incorporated by reference "the initial adjudication and interim disposition order, the dispositional order entered on 25 October 2018, and the 3 September 2020 permanency planning order that made adoption Dana's permanent plan[,]" which describe respondent-father's and the mother's history of substance abuse, the establishment of the parents' respective case plans, and "their general noncompliance with the steps of those case plans over the life of the case." The GAL argues that the incorporation of these prior

orders, "plus the language that informed respondent-father that he had not made adequate progress on the conditions that led to the original adjudication, put respondent[-]father on notice that his rights could be terminated based on neglect or willful failure to make reasonable progress." The GAL asserts that the trial court's findings support such an adjudication pursuant to N.C.G.S. § 7B-1111(a)(1) or (2).

¶ 15 DSS joins the GAL's argument that the motion to terminate parental rights provided respondent-father with adequate notice that his parental rights could be terminated pursuant to N.C.G.S. § 7B-1111(a)(2).[3] However, DSS submits that the requirement for adequate notice "may be satisfied by findings made in court orders attached to" the termination motion alone.

¶ 16 In support of their positions, DSS and the GAL rely upon *In re Hardesty*, 150 N.C. App. 380, and *In re Quevedo*, 106 N.C. App. 574, 578, *appeal dismissed*, 332 N.C. 483 (1992). In those cases, the Court of Appeals held that a termination of parental rights petition which included only a "bare recitation . . . of the alleged statutory *grounds* for termination" was insufficient to comply with the statutory requirement that a petition contain sufficient facts to warrant a determination that *grounds* for termination exist. *In re Quevedo*, 106 N.C. App. at 579; *In re Hardesty*, 150 N.C. App. at 384. In *In re Quevedo*, the petition to terminate parental rights alleged that the respondent "neglected the child[,]" and "willfully abandoned the child for at least six (6) months immediately preceding the filing of the petition." 106 N.C. App. at 578–79. The Court of Appeals concluded that the petition sufficiently alleged grounds for termination because in addition to that "bare recitation" of the statutory language, the termination petition incorporated an earlier custody award, which contained "sufficient facts to warrant such a determination." *Id.* at 579. The petition in *In re Hardesty* alleged that the respondent was "incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is dependent and there is a reasonable probability that such incapability will continue for the foreseeable future." 150 N.C. App. at 384. In *Hardesty*, the lower appellate court opined that "[u]nlike *Quevedo*, there was no earlier order containing the requisite facts incorporated into the petition[,]" and decided that the petition, which "merely use[d] words similar to those in the statute setting out grounds for termination," was insufficient to put the respondent "on notice as to what acts, omissions or conditions [were] at issue." *Id.*

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3. DSS only argues that the trial court properly adjudicated grounds for termination under N.C.G.S. § 7B-1111(a)(2). DSS does not address any of the other grounds.

¶ 17 Unlike in *In re Quevedo* and *In re Hardesty*, the termination motion in the present case does not even contain a "bare recitation" of the statutory grounds for termination pursuant to N.C.G.S. § 7B-1111(a)(1) or (2). While the GAL contends that the termination motion's sentence representing that the "parents have done nothing to address or alleviate the conditions which led to the adjudication of this child as a neglected juvenile[,]" which was located in the paragraph beginning "Per G.S. 7B-1111(a)(6) both parents are incapable of providing for the proper care and supervision of the juvenile such that the juvenile is a dependent juvenile" is sufficient, nonetheless this statement does not adequately allege the statutory language for an adjudication of the existence of grounds to terminate parental rights pursuant to N.C.G.S. § 7B-1111(a)(1) or (2). *See* N.C.G.S. § 7B-1111(a)(1) ("The parent has abused or neglected the juvenile. The juvenile shall be deemed to be abused or neglected if the court finds the juvenile to be an abused juvenile within the meaning of G.S. 7B-101 or a neglected juvenile within the meaning of G.S. 7B-101."); *see* N.C.G.S. § 7B-1111(a)(2) ("The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile."). Therefore, we reject the GAL's assertion here that the termination motion's above-referenced sentence, even when coupled with the incorporation of prior orders, was "sufficient to warrant a determination" that grounds for terminating parental rights existed under N.C.G.S. § 7B-1111(a)(1) or (2). *See* N.C.G.S. § 7B-1104(6). We also rebuff DSS's contention that respondent-father's notice of potential adjudication pursuant to subsection (a)(2) "was more than sufficient" based upon the motion to terminate incorporating "generally all of the prior orders and court reports and specifically" the adjudication order, the dispositional order, and the 3 September 2020 permanency planning order. To hold otherwise would nullify the notice requirement of N.C.G.S. § 7B-1104(6) and contravene the delineation of specific grounds for terminating parental rights. The consequence of such a decision would require a respondent parent to refute any termination ground that could be supported by any facts alleged in any document attached to a termination motion or petition.

¶ 18 Moreover, DSS drafted the termination motion at issue and could have specifically included either or both N.C.G.S. § 7B-1111(a)(1) or (2) as grounds for termination of parental rights but did not do so. DSS's and the GAL's arguments on appeal constitute an impermissible attempt to conform the termination of parental rights motion to the evidence presented at the termination hearing. *See In re B.L.H.*, 190 N.C. App.

142, 146 (reversing the trial court's allowance of DSS to amend the termination petition at the hearing to add grounds which were not alleged), *aff'd per curiam*, 362 N.C. 674 (2008).

¶ 19 We conclude that the motion to terminate parental rights was insufficient to provide notice to respondent-father that his parental rights were subject to termination for neglect or for willful failure to make reasonable progress pursuant to N.C.G.S. § 7B-1111(a)(1) or (2), and therefore the trial court's adjudication finding the existence of either ground was error. *See In re B.O.A.*, 372 N.C. 372, 382 (2019) ("a trial court would clearly err by terminating a parent's parental rights in a child for failure to make reasonable progress pursuant to N.C.G.S. § 7B-1111(a)(2) in the event that this ground for termination had not been alleged in the termination petition or motion,") *see also In re S.R.G.*, 195 N.C. App. 79, 83 (2009) (holding that the failure to allege that the parent's parental rights were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2) deprived the trial court of the right to terminate the parent's parental rights on the basis of that statutory ground for termination).

¶ 20 For the same reason, we find to be unpersuasive the GAL's argument that respondent-father "waived any objection to the sufficiency of the petition to allege" grounds for termination under N.C.G.S. § 7B-1111(a)(1) or (2) because he did not present any such arguments at the termination of parental rights hearing and because he presented evidence of his compliance with the case plan along with his efforts to address the issues that led to the juvenile Dana's removal. The GAL relies, in part, on *In re H.L.A.D.*, 184 N.C. App. 381, 392 (2007), *aff'd per curiam*, 362 N.C. 170 (2008) for this contention. The respondent-father in *In re H.L.A.D.* moved to dismiss the termination of parental rights petition in the trial court after the presentation of the petitioner's evidence and at the close of all of the evidence "based on the insufficiency of the evidence[.]" *Id.* at 392. On appeal, the respondent-father argued, *inter alia*, that the termination petition failed to comply with the requirements of N.C.G.S. § 7B-1104(6) by failing to allege sufficient facts to warrant a determination that grounds existed to terminate his parental rights. *Id.* at 392. The Court of Appeals noted in its decision that since the Rules of Civil Procedure apply to termination proceedings, a Rule 12(b)(6) motion cannot be made for the first time on appeal. *Id.* Because the respondent-father's argument on appeal in *In re H.L.A.D.* challenged the legal sufficiency of the petition itself and not the sufficiency of the evidence as he argued in his motion to dismiss in the trial court, the Court of Appeals held that the respondent-father failed to properly preserve the sufficiency of the petition issue for appeal. *Id.* Notably, the father

in *In re H.L.A.D.* was arguing that the facts alleged in the petition were insufficient to support the grounds alleged in the petition, not that the petition failed to allege the grounds on which the trial court ultimately made a determination. *Id.*

¶ 21 Additionally, it would be illogical to conclude in the instant case that respondent-father waived appellate review by failing to object at the termination hearing because the motion to terminate his parental rights failed to provide him with notice that his parental rights were potentially subject to termination under N.C.G.S. § 7B-1111(a)(1) or (2). The only grounds for adjudication specified in the motion for termination of parental rights and at the termination hearing were N.C.G.S. § 7B-1111(a)(3) and (6). Grounds for termination pursuant to N.C.G.S. § 7B-1111(a)(1) and (2) appear for the first time in the trial court's subsequent written order; therefore, the first and only available time to challenge the adjudication of the existence of grounds addressed in N.C.G.S. § 7B-1111(a)(1) and (2) is on appeal. *See In re B.R.W.*, 278 N.C. App. 382, 2021-NCCOA-343, ¶ 40 ("An appeal is the procedure for 'objecting' to the trial court's findings of fact and conclusions of law.").

¶ 22 We also hold in the current case that the termination of parental rights motion did not provide notice to respondent-father that his parental rights were subject to termination for willful abandonment pursuant to N.C.G.S. § 7B-1111(a)(7). The termination motion only specified N.C.G.S. § 7B-1111(a)(7) as grounds for termination for Dana's mother; consequently, the trial court's findings of fact and conclusions of law that respondent-father abandoned Dana were erroneous. *In re B.O.A.*, 372 N.C. at 382. Accordingly, we only consider the properness of the trial court's adjudication of the existence of grounds to terminate for which respondent-father received adequate notice in the termination motion; namely N.C.G.S. § 7B-1111(a)(3) and (6).

C. Grounds for Adjudication

¶ 23 **[3]** Respondent-father challenges the trial court's findings of fact and the sufficiency of the evidence upon which the findings are based which led to the forum's determination that grounds existed for the termination of his parental rights under N.C.G.S. § 7B-1111(a)(3) and (6). This Court reviews a trial court's adjudication under N.C.G.S. § 7B-1111 "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Montgomery*, 311 N.C. 101, 111 (1984). "[T]he issue of whether a trial court's adjudicatory findings of fact support its conclusion of law that grounds existed to terminate parental rights pursuant to

N.C.G.S. § 7B-1111(a)" is reviewed de novo. *In re T.M.L.*, 377 N.C. 369, 2021-NCSC-55, ¶ 15.

¶ 24 As discussed above, the trial court could have only adjudicated grounds to terminate respondent-father's parental rights pursuant to N.C.G.S. § 7B-1111(a)(3) and (6). Respondent-father acknowledges DSS alleged the existence of grounds under N.C.G.S. § 7B-1111(a)(3) in its motion, but he argues that no evidence was presented, and the trial court made no findings, concerning child support.

¶ 25 A "court may terminate parental rights upon a finding" that

> [t]he juvenile has been placed in the custody of a county department of social services . . . and the parent has for a continuous period of six months immediately preceding the filing of the petition or motion willfully failed to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

N.C.G.S. § 7B-1111(a)(3) (2021).

¶ 26 Here, the trial court made a single finding concerning the payment of support, which recited the statutory language:

> Per G.S. 7B-1111(a)(3) neither parent has not [*sic*] paid any consistent support for the minor child, the juvenile having been placed in the custody of [DSS] for a continuous period of six months next preceding the filing of the petition. Both parents have willfully failed for such a period to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so, in that neither parent is disabled, is able to work, and has paid nothing towards the cost of care of the minor child during that period of time.

Whether this finding is best classified as an ultimate finding of fact or a conclusion of law is irrelevant because "that classification decision does not alter the fact that the trial court's determination concerning the extent to which a parent's parental rights in a child are subject to termination on the basis of a particular ground must have sufficient support in the trial court's factual findings." *In re N.D.A.*, 373 N.C. 71, 77 (2019). The trial court entered no other findings regarding the cost of care for the juvenile Dana or concerning respondent-father's ability to pay. *Cf. In re S.E.*, 373 N.C. 360, 367 (2020) (holding that where a trial

court's findings regarding a reasonable portion of the cost of care of the child is "a sum greater than zero[,]" the respondent's ability to pay "a sum greater than zero" and her failure to do so were sufficient to support an adjudication of grounds under N.C.G.S. § 7B-1111(a)(3)). Moreover, no such evidence as to the cost of the child's care or respondent-father's ability to pay was introduced at the termination hearing or into the record. Consequently, insofar as the trial court adjudicated grounds to terminate respondent-father's parental rights pursuant to N.C.G.S. § 7B-1111(a)(3), such an adjudication is unsupported by the evidence contained in the record and any resulting findings of fact, and therefore must be reversed. *See In re Z.G.J.*, 378 N.C. 500, 2021-NCSC-102, ¶ 33.

¶ 27 The order terminating the parental rights of both parents similarly contained a single finding which recognized the ground of dependency to exist. It stated:

> Per G.S. 7B-1111(a)(6) both parents are incapable of providing for the proper care and supervision of the juvenile such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101 and there is a reasonable probability that such incapability will continue for the foreseeable future. Neither parent has provided for the financial or housing needs of the child since the child came into the custody of [DSS], and neither is prepared to do so now.

However, an adjudication under N.C.G.S. § 7B-1111(a)(6)

> requires the trial court to make two ultimate findings: (1) that the parent is incapable (and will continue to be incapable for the foreseeable future) of providing proper care and supervision to their child, rendering the child a "dependent juvenile" as defined by N.C.G.S. § 7B-101(9) . . .; and (2) that the parent lacks an appropriate alternative child care arrangement.

In re K.C.T., 375 N.C. 592, 596 (2020) (quoting N.C.G.S. § 7B-1111(a)(6) and citing *In re K.R.C.*, 374 N.C. 849, 859 (2020)).

¶ 28 DSS forgoes the presentation of any arguments concerning the trial court's purported adjudication under N.C.G.S. § 7B-1111(a)(6), and the GAL concedes that the trial court's findings of fact are insufficient "to support the ground of dependency, because the trial court did not address the availability of an alternate placement option[.]" We agree with the GAL's candid acknowledgement that the trial court failed to find that

respondent-father lacked an appropriate alternative childcare arrangement. Moreover, respondent-father was not questioned about potential alternative childcare arrangements during his testimony at the termination hearing. No other witness addressed the issue. "Since the trial court failed to make this required finding and no evidence was presented that would allow it to make such a finding," any such "conclusion that dependency provides a ground for termination must be reversed." *In re K.C.T.*, 375 N.C. at 597.

D. Dispositional Determination

¶ 29 Lastly, respondent-father argues that the trial court failed to make sufficient findings of fact to support its determination that termination of respondent father's parental rights was in the juvenile Dana's best interests. However, since we have already concluded that the trial court erred by adjudicating the existence of grounds to terminate respondent-father's parental rights under N.C.G.S. § 7B-1111(a), we do not need to address this issue. *See In re Young*, 346 N.C. 244, 252 (1997).

III. Conclusion

¶ 30 Because respondent-father failed to appeal the underlying adjudication and dispositional orders, he is precluded from instituting a collateral attack upon the custody determinations in those orders in this appeal from the order terminating his parental rights. With regard to the existence of grounds for the termination of respondent-father's parental rights, the termination of parental rights motion failed to provide sufficient notice to respondent-father that his parental rights were potentially subject to termination under N.C.G.S. § 7B-1111(a)(1), (2) or (7), and therefore the trial court erred in adjudicating the existence of those grounds. As to the grounds which were adequately alleged in the motion to terminate parental rights, insufficient evidence was presented, and thereupon insufficient findings were made, to support an adjudication of grounds for termination of parental rights under N.C.G.S. § 7B-1111(a)(3) or (6). Accordingly, this Court holds that the trial court erred in adjudicating the existence of grounds to support a termination of respondent-father's parental rights. Therefore, we reverse the trial court's order.

REVERSED.

IN RE E.D.H.

[381 N.C. 395, 2022-NCSC-70]

IN THE MATTER OF E.D.H.

No. 207A21

Filed 17 June 2022

Civil Procedure—presumption of regularity—order terminating parental rights—signed by judge who did not preside over hearing—administrative and ministerial action

An order terminating respondent-mother's parental rights, signed by the chief district court judge after the judge who had presided over the hearing retired—which stated in an unchallenged finding that the findings of fact, conclusions of law, and decretal had been announced in chambers by the now-retired judge, and that the order was administratively and ministerially signed by the chief district court judge—was held to be properly entered in an administrative and ministerial capacity pursuant to Civil Procedure Rules 52 and 63 where respondent-mother failed to rebut the presumption of regularity.

Justice HUDSON dissenting.

Justices MORGAN and EARLS join in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) (2019) from an order entered on 15 February 2021 by Chief District Court Judge David V. Byrd in District Court, Wilkes County. Heard in the Supreme Court on 24 May 2022 in session in the Old Burke County Courthouse in the City of Morganton pursuant to N.C.G.S. § 7A-10(a).

Erika Leigh Hamby for petitioner-appellee Wilkes County Department of Social Services.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by J. Mitchell Armbruster, for appellee Guardian ad Litem.

Peter Wood for respondent-appellant mother.

BARRINGER, Justice.

IN RE E.D.H.

[381 N.C. 395, 2022-NCSC-70]

¶ 1 Respondent appeals from an order terminating her parental rights to her minor child E.D.H. (Emily).[1] According to respondent, the trial court committed prejudicial error when Chief District Court Judge David V. Byrd signed the termination order after Judge Jeanie R. Houston, who had presided over the hearing, retired. After careful review, we hold that that termination order was properly entered pursuant to Rules 52 and 63 of the North Carolina Rules of Civil Procedure. Accordingly, we affirm the trial court's order terminating respondent's parental rights.

I. Factual and Procedural Background

¶ 2 The Wilkes County Department of Social Services (DSS) first got involved with Emily's family in September of 2017 due to allegations of domestic violence that resulted in Emily's father being charged with and later convicted of child abuse.[2] In February of 2018, DSS investigated a report of domestic violence occurring between the two parents while Emily was present and discovered that Emily's lower back was bruised significantly. Neither parent could nor would identify the source of the bruising. As a result, DSS requested a safety placement for Emily and, after the parents were unable to provide one, obtained nonsecure custody of Emily. Emily was subsequently adjudicated an abused and neglected juvenile.

¶ 3 DSS developed a case plan to address the conditions that led to Emily's removal, particularly respondent's mental health and mental stability. Respondent's mental health diagnoses included schizoaffective disorder, substance abuse disorder cannabis, mood disorder, bipolar II disorder, and post-traumatic stress disorder. Respondent initially participated in therapy, but her participation appeared to have ceased during the six months prior to the termination hearing. During the pendency of the case, respondent voluntarily committed herself on two separate occasions. Additionally, respondent's interactions with the social worker prior to the termination hearing did not display stable mental health.

¶ 4 Another objective of respondent's case plan was remedying her history of domestic violence. A domestic violence assessment scored respondent as high risk. Respondent did not complete a program to address this risk until two years after the assessment and over seven months after DSS filed the termination petition. Respondent also had a

1. A pseudonym is used in this opinion to protect the juvenile's identity and for ease of reading.

2. Emily's father did not appeal from the termination order, which also terminated his parental rights, and is not a party to this appeal.

history of separating from and getting back together with Emily's father. At one point, respondent testified that she was separating from Emily's father and never going back due to his abuse of her, but then later that week, respondent reported she was back in a relationship with him. Respondent also blamed a failed drug screen on Emily's father, alleging that he had forcibly injected her with methamphetamine.

¶ 5 At the time of the termination hearing, respondent resided in an unapproved placement. Additionally, none of the potential alternative placements respondent provided DSS were willing or appropriate placements for Emily. Prior to this case, respondent's parental rights had been involuntarily terminated to three other children.

¶ 6 DSS petitioned to terminate respondent's parental rights in Emily based on dependency, N.C.G.S. § 7B-1111(a)(6), and on the basis of having had her parental rights to another child involuntarily terminated by a court of competent jurisdiction and respondent lacking the ability or willingness to establish a safe home, N.C.G.S. § 7B-1111(a)(9). A hearing on the petition to terminate respondent's parental rights in Emily was conducted on 25 August 2020 before Judge Houston. Respondent was present and represented by counsel.

¶ 7 After the presentation of evidence and arguments of counsel as to adjudication, Judge Houston found that grounds alleged for termination as to respondent existed and proceeded to the dispositional phase. Following the presentation of evidence and arguments of counsel as to disposition, Judge Houston took the matter under advisement and scheduled an in-chambers conference with the attorneys for the following Thursday, 27 August 2020.

¶ 8 Judge Houston retired from office on 31 December 2020. On 15 February 2021, an order was entered terminating respondent's parental rights in Emily based on an adjudication of grounds under N.C.G.S. § 7B-1111(a)(6) and (9) and a dispositional determination that it was in Emily's best interests to terminate respondent's parental rights. The order states: "Findings of fact, conclusions of law, and decretal announced in chambers on the 28th day of August 2020 by the Honorable Jeanie R. Houston . . . [a]dministratively and ministerial[l]y signed by the Chief District Court Judge this the 15th day of Feb[ruary], 2021." Respondent appealed.

II. Analysis

¶ 9 On appeal, respondent does not contest the trial court's adjudication that grounds existed to terminate her parental rights pursuant to

N.C.G.S. § 7B-1111(a)(6) and (9), nor does respondent challenge the trial court's determination that terminating her parental rights was in Emily's best interests. Instead, respondent's only argument is that the order was a nullity pursuant to Rules 52 and 63 of the North Carolina Rules of Civil Procedure because Chief Judge Byrd signed the order without presiding over the hearing.

A. Standard of Review

¶ 10 The North Carolina Rules of Civil Procedure are part of the General Statutes. *See* N.C.G.S. § 1A-1 (2021). Accordingly, interpreting the Rules of Civil Procedure is a matter of statutory interpretation. *See Lemons v. Old Hickory Council, Boy Scouts of Am., Inc.*, 322 N.C. 271, 272, 276 (1988). "A question of statutory interpretation is ultimately a question of law for the courts." *Brown v. Flowe*, 349 N.C. 520, 523 (1998). We review conclusions of law de novo. *In re C.B.C.*, 373 N.C. 16, 19 (2019).

¶ 11 In contrast, "[a] trial court's finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding." *In re B.O.A.*, 372 N.C. 372, 379 (2019). Further, "[f]indings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407 (2019).

B. Validity of the Order

¶ 12 The only issue before this Court is whether the termination order was properly entered pursuant to Rules 52 and 63 of the North Carolina Rules of Civil Procedure. Rule 52 provides that "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." N.C.G.S. § 1A-1, Rule 52(a)(1). Rule 63 provides that

> [i]f by reason of . . . retirement . . . a judge before whom an action has been tried or a hearing has been held is unable to perform the duties to be performed by the court under these rules after a verdict is returned or a trial or hearing is otherwise concluded, then those duties, including entry of judgment, may be performed[ ]
>
> . . . .
>
> . . . [i]n actions in the district court, by the chief judge of the district . . . .

N.C.G.S. § 1A-1, Rule 63. However, "[i]f the substituted judge is satisfied that he or she cannot perform those duties because the judge did not preside at the trial or hearing or for any other reason, the judge may, in the judge's discretion, grant a new trial or hearing." N.C.G.S. § 1A-1, Rule 63.

¶ 13 One of "the duties to be performed by the court under these rules," N.C.G.S. § 1A-1, Rule 63, is finding the facts, stating the conclusions of law, and directing the entry of judgment pursuant to Rule 52. Thus, this Court has interpreted Rules 52 and 63 together to provide that a substitute judge cannot find facts or state conclusions of law in a matter over which he or she did not preside. *See In re C.M.C.*, 373 N.C. 24, 28 (2019). Conversely, and respondent concedes, if Judge Houston made the findings of fact and conclusions of law that appear in the order before retiring and Chief Judge Byrd did nothing more than put his signature on the order and enter it ministerially, the order is valid.

¶ 14 Respondent argues that the order is a nullity because the record is silent on whether the order was properly entered in accordance with Rules 52 and 63. However, in making this argument, respondent fails to recognize that she bears the burden of proving the order was improperly entered, due to the presumption of regularity. As this Court has long recognized,

> [i]t is, as a general rule presumed that a public official properly and regularly discharges his duties, or performs acts required by law, in accordance with the law and the authority conferred on him, and that he will not do any act contrary to his official duty or omit to do anything which such duty may require.

Huntley v. Potter, 255 N.C. 619, 628 (1961) (cleaned up). Thus, the burden is "on the party challenging the validity of public officials' actions to overcome this presumption by competent and substantial evidence." *Leete v. County of Warren*, 341 N.C. 116, 119 (1995); *see also Huntley*, 255 N.C. at 628.

¶ 15 Though this Court has not previously addressed whether the presumption of regularity applies to the specific action of a Chief Judge signing and entering an order with findings of fact and conclusions made by a retired judge, after careful review, we hold that it does. To begin with, this Court has long recognized that the "presumption of regularity attaches generally to judicial acts." *Freeman v. Morrison*, 214 N.C. 240, 243 (1938). We have also described this rule as a general presumption that applies when "a public official in the performance of an official duty

acts in accordance with the law and the authority conferred upon him." *State v. Watts*, 289 N.C. 445, 449 (1976). Based on this general characterization, Chief Judge Byrd's judicial action in this case would appear to qualify. Chief Judge Byrd was a public official: a chief district court judge; he performed an official duty in accordance with the law: signing and entering an order on behalf of a retired judge who presided over the hearing in accordance with Rules 52 and 63; and he acted within the authority conferred on him: Rules 52 and 63 authorize the chief district court judge to sign and enter such an order and Chief Judge Byrd was the chief district court judge of his district.

¶ 16 Moreover, this Court's precedent supports applying the presumption of regularity to this case because the action in question was administrative and ministerial. In *Henderson County v. Osteen*, 297 N.C. 113 (1979), for instance, we held that the mailing of a notice of sale by the sheriff's office fell within the presumption of regularity. *Id.* at 117. In *State v. Watts*, we held that the authentication of records by an authorized officer of the Division of Motor Vehicles received this presumption. *Watts*, 289 N.C. at 449–50.[3] And in *In re N.T.*, 368 N.C. 705 (2016), we held that a signature appearing in a space marked for "Signature of Person Authorized to Administer Oaths" should receive this presumption. *Id.* at 708. In each of those cases, the official's action at issue was administrative and ministerial. Likewise, in this case, the action of the Chief District Judge, signing and entering an order, was also purely administrative and ministerial. Thus, the presumption of regularity applies in this case.

¶ 17 Applying the presumption of regularity, we presume that Chief Judge Byrd signed the order in an exclusively administrative and ministerial capacity, in conformance with Rules 52 and 63. To challenge this presumption, respondent must meet the heavy burden of proving that Chief Judge Byrd violated the Rules of Civil Procedure and signed the order despite not knowing whether Judge Houston made the findings of fact and conclusions of law that appear in it. Yet respondent failed to provide any evidence that Chief Judge Byrd improperly signed the order. Nor can respondent argue that such evidence was unavailable because the announcement occurred off the record. Rule 9(c)(1) of the North Carolina Rules of Appellate Procedure provides an express avenue to include off-the-record evidence in the record on appeal. N.C. R. App. P. 9(c)(1). Respondent chose not to pursue this option. As a result,

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3. Notably, the public officials whose actions were challenged were not named parties in *Osteen* or *Watts*.

respondent failed to meet her burden, and the presumption of regularity was unrebutted.

¶ 18 Further, respondent is incorrect that the record is entirely silent on who made the findings of fact and conclusions of law that appear in the order. The order includes a statement that "[f]indings of fact, conclusions of law, and decretal announced in chambers on the 28th day of August 2020 by the Honorable Jeanie R. Houston." While this statement is not labeled as a finding of fact, this Court has previously recognized that "[r]egardless of the label given by the trial court, this Court is 'obliged to apply the appropriate standard of review to a finding of fact or conclusion of law.' " *In re S.C.L.R.*, 378 N.C. 484, 2021-NCSC-101, ¶ 19 (quoting *In re J.S.*, 374 N.C. 811, 818 (2020)). Whether a certain action occurred at a given place and time is a question of fact. *See State ex rel. Utils. Comm'n v. Pub. Staff–N.C. Utils. Comm'n*, 322 N.C. 689, 693 (1988). Therefore, a statement in the order that on 28 August 2020 Judge Houston announced in chambers the findings of fact, conclusions of law, and decretal that appear in the order is a finding of fact.

¶ 19 Since respondent never specifically challenged the finding that Judge Houston made the findings of fact and conclusions of law that appear in the order, it is binding on appeal. *See In re T.N.H.*, 372 N.C. at 407. Moreover, even if respondent's brief is interpreted as challenging this finding, the finding is supported by the presumption of regularity, which respondent has failed to rebut. At best, respondent can point to a discrepancy between the trial transcript and the adjudication of one of the grounds regarding Emily's father. However, "a trial court's oral findings are subject to change before the final written order is entered," *In re A.U.D.*, 373 N.C. 3, 9–10 (2019), and Emily's father is not a party to this appeal and has not challenged that adjudication. More importantly, a single discrepancy between the transcript and the order is not sufficient to rebut the "heavy burden" a party faces when challenging the presumption of regularity, which must be satisfied "with *competent and substantial* evidence." *See Leete*, 341 N.C. at 119 (emphasis added).

¶ 20 By that same reasoning, other evidence in the record supports the order. For example, DSS had alleged a third ground existed to terminate respondent's parental rights: willful failure to pay a reasonable portion of the cost of the juvenile's care pursuant to N.C.G.S. § 7B-1111(a)(3). However, during the hearing, DSS dismissed all claims against respondent under N.C.G.S. § 7B-1111(a)(3). At the conclusion of the adjudicatory hearing, Judge Houston stated that she would find the existence of "all the grounds" for termination against respondent. Looking to the order, it concludes that grounds exist to terminate respondent's parental

rights under N.C.G.S. § 7B-1111(a)(6) and (a)(9) but not (a)(3), which was consistent with the discussions that occurred at the hearing. The transcript also reflects that at the conclusion of the hearing a meeting regarding the case was scheduled between Judge Houston and the parties' attorneys for Thursday, August 27. It is a reasonable inference that on August 28, the day after the meeting, Judge Houston would announce the findings of fact and conclusions of law that appear in the order.

¶ 21 In summary, there is an unchallenged finding of fact in the record that Judge Houston made the findings of fact and conclusion of law that appear in the order. The finding is supported by the presumption of regularity which respondent has failed to rebut. Based on this finding, Chief Judge Byrd's signature and entry of the order was an exclusively administerial and ministerial action, which meets the legal requirements of Rules 52 and 63. Therefore, respondent has failed to prove that the order was a nullity.

III. Conclusion

¶ 22 Emily has been in the care and custody of DSS since February of 2018. Her parents' parental rights have been terminated since February of 2021. Yet over a year since the termination order was entered and four years since entering DSS custody, Emily still has not received permanence.

¶ 23 Respondent does not challenge the trial court's adjudication that grounds existed to terminate her parental rights or that termination was in Emily's best interests. Instead, her only argument on appeal is that the order was a nullity when it was entered. However, as discussed, the order is supported by the presumption of regularity, which respondent has failed to rebut, as well as an unchallenged finding of fact. Accordingly, we affirm the order terminating respondent's parental rights.

AFFIRMED.

Justice HUDSON dissenting.

¶ 24 The judicial process earns its credibility, in part, by showing its work. A case's paper record and trial court documents allow both the parties and appellate courts to understand the procedural and substantive foundation of a trial court's ultimate outcome. As the stakes of that outcome are raised, so is the importance of its foundational process and reasoning.

¶ 25 Here, the thin record cannot bear the weight of the order's heavy consequence. The August 2020 hearing transcript indicates that the initial judge, Judge Jeanie R. Houston, made a few oral findings, took the case under advisement, and planned on convening a subsequent meeting for further conversation. However, there is no record of that meeting or of any findings or conclusions made therein, or at any point before Judge Houston's December 2020 retirement. Chief District Court Judge David V. Byrd's February 2021 written order summarily states that its findings and conclusions were made at an August 2020 meeting but in fact directly contradicts some of the initial findings announced at the hearing. The February 2021 order also states that it was signed "administratively and ministerially," but the record's gaps indicate otherwise. Notably, the consequence of this order could hardly be more severe: it permanently severs the parental rights of a mother to her young daughter.

¶ 26 In my view, Rules 52, 58, and 63 of our Rules of Civil Procedure collectively require more. Above, the majority's improper application of a "presumption of regularity" contorts a de novo review of a legal conclusion into a much more deferential standard, allowing the substitute judge's mere recitation of the "administrative and ministerial" requirement to patch significant holes in the record. Likewise, the majority erroneously determines that Chief Judge Byrd's factual finding regarding the 28 August 2020 in-chambers meeting is unchallenged and therefore binding, when in fact respondent's entire appeal is implicitly and explicitly founded on challenging that finding. Through both errors, the majority's analysis turns this case on its head, determining that respondent has provided insufficient evidence of irregularity when in fact this lack of evidence is precisely what respondent challenges and what renders the record so irregular in the first place. In so doing, the majority improperly applies a presumption of regularity to justify the entry of the order by the chief judge, who had not heard the evidence. Because no party to this action argued for or even mentioned a presumption of regularity, and because Rules 52, 58, and 63 set forth the procedure and foundational principles of our analysis, I respectfully dissent.

I. Factual and Procedural Background

¶ 27 On 22 November 2019, DSS filed a petition to terminate the parental rights of respondent and the father in their daughter, Emily. As to respondent, DSS alleged two grounds for termination: (1) dependency, N.C.G.S. § 7B1111(a)(6); and (2) respondent had previously had her parental rights to another child terminated, N.C.G.S. § 7B-1111(a)(9). As to the father, DSS alleged two grounds for termination: (1) the father

willfully failed to pay a reasonable portion of Emily's cost of care, N.C.G.S. § 7B-1111(a)(3); and (2) dependency, N.C.G.S. § 7B-1111(a)(6).

¶ 28 On 25 August 2020, Judge Houston conducted a hearing on the petition. After hearing testimony from several witnesses and arguments from the parties regarding adjudication, Judge Houston stated: "All right. I'll find there's grounds. What do you say about the dad's child support? I actually made a note of that myself." In response, DSS's attorney made further arguments regarding the father's child support obligations. Ultimately, Judge Houston stated: "I'm going to find *all the grounds except for that one*. I actually agree with you on that one, [father's attorney]." (Emphasis added). Accordingly, Judge Houston implied that she would find the existence of both alleged grounds to terminate respondent's parental rights (dependency and prior termination of parental rights), but only *one* of the two alleged grounds to terminate father's parental rights (dependency but not failure to pay a reasonable portion of cost of care).

¶ 29 Next, the trial court proceeded with testimony and arguments regarding disposition. After the conclusion of these arguments, Judge Houston did not announce any further findings or conclusions. Instead, she took the matter under advisement. Specifically, Judge Houston stated:

> All right, folks. I've got all these exhibits to look at and the report from the guardian [ad litem] and the medical records. So I'll get up—I'm here Thursday [27 August 2020], okay. I would suspect I'd see every one of you but [DSS's attorney] Thursday. So we'll get [DSS's attorney] on the phone, and we'll have a conversation, and I'll let you get back to your clients.

This concluded the hearing.

¶ 30 From there, the record is silent as to the occurrence or outcome of any subsequent meeting between Judge Houston and the parties. According to DSS, "[i]nstead of rendering a decision the following Thursday [27 August 2020] as indicated, Judge Houston rendered her decision in chambers on [28 August 2020,] the following Friday." According to respondent, though, "[n]othing in the record indicates that the court ever conducted a further hearing, met with counsel to discuss the order, drafted an order, or that Judge Houston ever entered oral findings on either adjudication or disposition."

¶ 31 On 31 December 2020, Judge Houston retired. There is no direct evidence in the record of Judge Houston having made any further factual findings or legal conclusions before her retirement.

¶ 32 On 15 February 2021, the trial court entered an order terminating the parental rights of respondent and the father. Following extensive factual findings, the order concludes that both grounds exist to terminate respondent's parental rights: (1) dependent juvenile; and (2) prior TPR. The order further concludes that both grounds exist to terminate father's parental rights: (1) failure to pay a reasonable portion of Emily's cost of care; and (2) dependency. The order then concludes that "it is in the best interests of the minor child and is consistent for her health and safety for [respondent's and the father's] parental rights to be terminated so that the minor child can proceed with the Permanent Plan of adoption." After the subsequent decretal formally terminating the parental rights of respondent and the father, the order states:

> HELD IN AB[E]YANCE IN OPEN COURT ON THE 25th DAY OF AUGUST, 2020.
>
> FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECRETAL ANNOUNCED IN CHAMBERS ON THE 28th DAY OF AUGUST 2020 BY THE HONORABLE JEANIE R. HOUSTON.
>
> ADMINISTRATIVELY AND MINISTERIALLY SIGNED BY THE CHIEF DISTRICT COURT JUDGE THIS THE 15TH DAY OF FEB[RUARY], 2021.

Below these statements, the order is hand-signed "D. V. Byrd for JRH."

¶ 33 On 16 March 2021, respondent appealed to this Court from the February 2021 order. On appeal, respondent argues that the trial court committed prejudicial error when Chief Judge Byrd signed the February 2021 order when he had not presided over the hearing and Judge Houston had retired.

II. Analysis

¶ 34 Now, this Court must determine whether the February 2021 order is valid under three of our Rules of Civil Procedure: Rules 52, 58, and 63. *See In re C.B.C.*, 373 N.C. 16, 19 (2019). I would hold that it is not.

¶ 35 As noted by the parties and the majority above, this case requires the interpretation of our Rules of Civil Procedure and is therefore reviewed de novo. *Brown v. Flowe*, 349 N.C. 520, 523 (1998). "We review a

trial court's adjudication under N.C.G.S. § 7B-1111 to determine whether the findings are supported by clear, cogent, and convincing evidence and the findings support the conclusions of law. The trial court's conclusions of law are reviewable de novo on appeal." *In re S.C.L.R.*, 378 N.C. 484, 2021-NCSC-101, ¶ 15 (cleaned up).

¶ 36 Rule 52, titled "Findings by the court," requires that "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." N.C.G.S. § 1A-1, Rule 52(a)(1) (2021).

¶ 37 Rule 58, titled "Entry of judgment," establishes that "a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court pursuant to Rule 5." N.C.G.S. § 1A-1, Rule 58 (2021)

¶ 38 Finally, Rule 63, titled "Disability of a judge," states that:

> If by reason of . . . retirement . . . a judge before whom an action has been tried or a hearing has been held is unable to perform the duties to be performed by the court under these rules *after a verdict is returned or a trial or hearing is otherwise concluded*, then those duties, including entry of judgment, may be performed:
>
> . . . .
>
> (2) In actions in the district court, by the chief judge of the district. . . .
>
> If the substituted judge is satisfied that he or she cannot perform those duties because the judge did not preside at the trial or hearing or for any other reason, the judge may, in the judge's discretion, grant a new trial or hearing.

N.C.G.S. § 1A-1, Rule 63 (2021) (emphasis added).

¶ 39 Four similar cases usefully illustrate how our appellate courts have considered the intersection of these rules within the termination of parental rights context. First, in *In re Whisnant*, the Court of Appeals considered the validity of a termination of parental rights order that was signed by a different judge than the judge who conducted the hearing. 71 N.C. App. 439, 440 (1984). The court stated that Rule 52 "requires the trial court in [non-jury] proceedings to do three things: (1) find facts on all issues of fact joined on the pleadings, (2) declare conclusions of law

arising from the facts found, and (3) to enter judgment accordingly." *Id.* at 441. Although the initial judge had "presided over the hearing and then announced in open court that respondent's parental rights were terminated," the court determined that "[t]his is not sufficient compliance with the obligations imposed by Rule 52." *Id.*

¶ 40 Regarding Rule 63, the *In re Whisnant* court observed that "[t]he function of a substitute judge is . . . ministerial rather than judicial." *Id.* "Rule 63," the court continued,

> does not contemplate that a substitute judge, who did not hear the witnesses and participate in the trial, may nevertheless participate in the decision[-]making process. It contemplates only performing such acts as are necessary under our rules of procedure to effectuate a decision already made. *Under our rules, where a case is tried before a court without a jury, findings of fact and conclusions of law sufficient to support a judgment are essential parts of the decision[-]making process.*

Id. at 441–42 (emphasis added) (cleaned up). Because there was no indication that the original judge had been unable to perform his duties, the court held that Rule 63 was inapplicable. *Id.* at 441. But because the original judge failed to meet the requirements of Rule 52, the Court of Appeals vacated the order for him to do so or if he was unavailable, for the case to be reheard de novo. *Id.* at 442.

¶ 41 Second, in *In re Savage*, the Court of Appeals again considered the validity of a termination of parental rights order that was signed by a different judge than the judge who heard the evidence. 163 N.C. App. 195, 196 (2004). Noting that its prior holding in *In re Whisnant* was "dispositive of this appeal," the court determined that under the requirements of Rules 52 and 63, the order was invalid. *Id.* at 197–98. Further, because the original judge "ha[d] since left office and is unavailable to render a decision in th[e] case on remand," the court held that it was "left with no choice but to remand this case for a hearing *de novo*." *Id.* at 198.

¶ 42 Third, in *In re C.M.C.*, this Court considered the validity of two termination of parental rights orders: an initial order that had been signed by a different judge than the judge who conducted the hearing and appealed by the respondent but subsequently vacated by the signing judge, and a second corrected order signed by the same judge who conducted the hearing. 373 N.C. 24, 25–27 (2019). Adopting the Rule 52 analysis in

both *In re Whisnant* and *In re Savage* summarized above, this Court "conclude[d] that the initial termination orders signed by [the substitute judge] were . . . a nullity." *Id.* at 28. We further determined that the initial order was also invalid under Rule 58, which "provides that a judgment is entered when it is reduced to writing, signed by *the* judge, and filed with the clerk of court." *Id.* (cleaned up). Ultimately, because "the entry of additional orders correct[ed] the error worked by [the substitute judge]'s decision to sign orders in a termination of parental rights case [over] which she had not presided," we affirmed the corrected order. *Id.* at 29.

¶ 43 Finally, in *In re R.P.*, the Court of Appeals considered the validity of a termination of parental rights order that was signed by a substitute judge after the judge who conducted the hearing and orally announced certain factual findings and conditions to be included in the order resigned before issuing the order. 276 N.C. App. 195, 2021-NCCOA-66, ¶¶ 8–11. Despite the parties' stipulation to the facts underlying the adjudication, the court, relying on *In re Whisnant*, stated that

> *nothing in the record or transcript shows [the original judge] ever made or rendered the final findings of fact and conclusions of law* in the unfiled and unsigned orders. He merely stated he would enter the adjudication "as is admitted to." Since the record on appeal shows only a stipulation without any adjudication of the facts and conclusions of law, or rendering of the order, any action by [the substitute judge] to cause the later prepared and unsigned draft order to be entered was not solely a ministerial duty.

Id. ¶ 23 (emphasis added). The court further reasoned that because "[t]he written disposition portion of the order went beyond the oral recitations of [the original judge,] . . . [r]endering and entering judgment was more than a ministerial task." *Id.* ¶¶ 26–27. Finally, the court noted that this Court's ruling in *In re C.M.C.* "specifically adopted the reasoning of [the Court of Appeals'] decisions in *In re Whisnant* and *In re Savage*" when considering the validity of termination of parental rights orders signed by substitute judges. *Id.* ¶ 29 (cleaned up). In light of this reasoning, the court held that the substitute judge "was without authority to sign the adjudication and disposition orders and the orders are a nullity." *Id.* ¶ 27 (cleaned up).

¶ 44 Collectively, as summarized by the majority here, these cases establish that

> a substitute judge cannot find facts or state conclusions of law in a matter over which he or she did not preside. Conversely, . . . if [the original judge] made the findings of fact and conclusions of law that appear in the order before retiring and [the substitute judge] did nothing more than put his signature on the order and enter it ministerially, the order is valid.

¶ 45 Here, in my opinion, these rules and precedents require this Court to vacate the February 2021 order below. As in the above cases, the original judge here presided over the hearing and made certain initial oral findings but never rendered finalized factual findings or legal conclusions, either orally or in writing. As in the above cases, the substitute judge here signed the February 2021 order despite not having presided over the hearing and without anything in the record showing the origin or details of the findings and conclusions that ultimately appear in the order. Further, as in *In re R.P.*, the order's findings and conclusions go well beyond any made on the record by the original judge during the hearing or thereafter. *In re R.P.*, ¶ 26. As in the above cases, therefore, Chief Judge Byrd here acted beyond a mere ministerial and administrative capacity, and the order is subsequently invalid under Rules 52, 58, and 63.

¶ 46 Of course, this case includes one notable fact that the above cases did not. Here, Chief Judge Byrd wrote at the end of the February 2021 order:

> HELD IN AB[E]YANCE IN OPEN COURT ON THE 25th DAY OF AUGUST, 2020.
>
> FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECRETAL ANNOUNCED IN CHAMBERS ON THE 28th DAY OF AUGUST 2020 BY THE HONORABLE JEANIE R. HOUSTON.
>
> ADMINISTRATIVELY AND MINISTERIALLY SIGNED BY THE CHIEF DISTRICT COURT JUDGE THIS THE 15TH DAY OF FEB[RUARY], 2021.

¶ 47 The majority's overreliance on these statements is the foundation of our disagreement about the correct outcome here. Specifically, the majority's error in my view arises from: (1) its improper application of a "presumption of regularity" to Chief Judge Byrd's legal conclusion that he signed the order "administratively and ministerially"; and (2) its erroneous determination that Chief Judge Byrd's factual finding regarding

the 28 August 2020 in-chambers announcement was unchallenged and therefore binding, and alternative application of a presumption of regularity to this factual finding.

¶ 48 First, the majority errs by applying a "presumption of regularity" to Chief Judge Byrd's statement that he signed the order "administratively and ministerially." Determining whether an order is signed in a purely administrative and ministerial capacity requires the application of legal standards to the present facts and is therefore a conclusion of law. *See Woodard v. Mordecai*, 234 N.C. 463, 472 (1951) ("Whether a statement is an ultimate fact or a conclusion of law depends upon whether it is reached by natural reasoning or by an application of fixed rules of law"). As a legal conclusion, then, this statement is properly reviewed by this Court de novo; it does not warrant a presumption of regularity. Previously, this Court has applied a presumption of regularity in two contexts: first to actions of public officials who are parties or otherwise involved in the litigation, and second to a trial court's decision to exercise jurisdiction over a case. *See In re C.N.R.*, 379 N.C. 409, 2021-NCSC-150, ¶ 20 (noting these two applications). Neither applies here.

¶ 49 In the first context, this Court has applied a presumption of regularity to challenged actions of a public official who is either a party in the case or otherwise directly involved in the facts of the underlying litigation. For instance, all six cases cited by the majority in its presumption of regularity analysis above fall into this category. In *Huntley v. Potter*, the Court applied a presumption of regularity to a town's land annexation report. 255 N.C. 619, 628 (1961). In *Leete v. County of Warren*, the Court applied a presumption of regularity to a county's employment action. 341 N.C. 116, 117 (1995). In *Freeman v. Morrison*, the Court applied a presumption of regularity to a notary public's lease acknowledgement. 214 N.C. 240, 242–43 (1938). In *State v. Watts*, the Court applied a presumption of regularity to the reprinted signature of a Department of Motor Vehicle official. 289 N.C. 445, 449 (1976). In *Henderson County v. Osteen*, the Court applied a presumption of regularity to a sheriff office's mailing of a notice of a tax foreclosure sale. 297 N.C. 113, 117 (1979). Finally, in *In re N.T.*, the Court applied a presumption of regularity to the illegible signature of a Wake County Human Services official on a juvenile petition. 368 N.C. 705, 707 (2016). In all of these cases, this Court afforded a presumption of regularity not to a legal conclusion of the trial court, but to the action of a public official or entity that was directly implicated in the case.

¶ 50 The second context in which this Court has previously applied a presumption of regularity is a trial court's decision to exercise jurisdiction

over a case. In these instances, "[t]his Court presumes the trial court has properly exercised jurisdiction unless the party challenging jurisdiction meets its burden of showing otherwise." *In re L.T.*, 374 N.C. 567, 569 (2020).

¶ 51 In some cases, this Court has applied both types of presumptions of regularity. For instance, in *In re C.N.R.*, where the respondent parents challenged a verification form because it was missing the date of its notarization, this Court held that respondents failed to overcome the presumption of regularity afforded both to notarial acts *and* to the trial court's exercise of jurisdiction over the case. 379 N.C. 409, 2021-NCSC-150, ¶ 20. Likewise, in *In re N.T.*, this Court held that respondent failed to overcome the presumption of regularity afforded both to the illegible petition signature *and* to the trial court's exercise of jurisdiction over the case. 368 N.C. at 708.

¶ 52 Here, neither version of the presumption of regularity applies. First, while Chief Judge Byrd is certainly a public official, he is neither a party in the case nor a tangential actor in the facts underlying the litigation whose clerical actions the court views with a certain degree of leniency; he is acting as the court itself. Second, this case does not present a question of jurisdiction but one of statutory interpretation. Respondent does not challenge Judge Houston's exercise of jurisdiction over the case; she challenges the validity of Chief Judge Byrd's subsequent actions under the Rules of Civil Procedure. Accordingly, Chief Judge Byrd's legal conclusion that he signed the February 2021 order "administratively and ministerially" does not fall within the actions to which this Court has previously applied a presumption of regularity.[1]

¶ 53 Nor should it. As the majority correctly notes above, this case presents a question of statutory interpretation that this Court must review de novo: whether Chief Judge Byrd's signing of the February 2021 order violates our Rules of Civil Procedure. By applying a presumption of regularity to Chief Judge Byrd's mere recitation of the "administratively and ministerially" requirement, the majority fails to review this legal conclusion de novo and instead improperly expands our presumption of regularity doctrine into new territory, tilting the scales significantly in favor of allowing the order to stand.

¶ 54 This expansion is ill-advised. To support its application of a presumption of regularity to Chief Judge Byrd's legal conclusion that he

1. Notably, both DSS and the guardian ad litem apparently recognize that a presumption of regularity is inapplicable in this case, as neither make any mention of or argument for such a presumption in their briefs.

signed the February 2021 order administratively and ministerially, the majority reasons that the presumption "attaches generally to judicial acts" and "applies when a public official in the performance of an official duty acts in accordance with the law and authority conferred upon him." Therefore, according to the majority, "Chief Judge Byrd's judicial action in this case would appear to qualify." Notably and problematically, though, this broad reasoning would also support applying a presumption of regularity to *any* statement or action by a judge acting in her official capacity, including both factual findings and legal conclusions. Such a broadly applied presumption of regularity would eviscerate the proper standards by which appellate courts review a trial court's findings and conclusions: for competent evidence and de novo, respectively.

¶ 55 Finally, the majority reasons that "this Court's precedent supports applying the presumption of regularity to this case because the action in question was administrative and ministerial." As noted above, though, the cases the majority cites are wholly inapplicable here because they exclusively apply a presumption of regularity to acts of public officials involved in the underlying litigation, not to a ruling of the trial court itself. What's more, this reasoning is entirely tautological: the majority first concludes that Chief Judge Byrd's action was administrative and ministerial because a presumption of regularity applies, and then concludes that a presumption of regularity applies because the action was administrative and ministerial. This reasoning cannot support its own weight and should be rejected.

¶ 56 To be clear, this does not imply that Chief Judge Byrd's "administratively and ministerially" conclusion should be considered untrustworthy or as lacking good faith. Rather, as in all de novo reviews of a legal conclusion, the judge's intentions are simply not a factor in our determination, which focuses exclusively on the order's legal validity. Here, our review does not consider whether or not Chief Judge Byrd *intended* to sign the order "administratively and ministerially," as he concluded. Instead, it considers the record evidence anew to determine whether or not his signing of the order was *actually* limited to an administrative and ministerial capacity, based on the available evidence in the record. Accordingly, in my opinion, the majority errs by applying a presumption of regularity to the judge's statement.

¶ 57 When properly reviewed de novo, the evidence in the record cannot adequately support the majority's conclusion that Chief Judge Byrd signed the order in a purely administrative and ministerial capacity in conformity with Rules 52 and 63. During the August 2020 hearing, Judge Houston indicated that she planned on finding both alleged grounds for

termination as to respondent (dependency and prior termination of parental rights) but only *one* of the alleged grounds for termination as to the father, (dependency but not failure to pay a reasonable portion of cost of care). After hearing arguments regarding disposition, though, Judge Houston did not make further findings or legal conclusions at that time; instead, she stated that she would hold the case in abeyance and conduct a future conversation with the parties. However, there is no direct evidence in the record of the occurrence or outcome of this future conversation. Instead, the record skips directly to Chief Judge Byrd's February 2021 order without any indication as to who made the order's extensive findings and conclusions or when they were made. The record is likewise silent on what, if any, communications occurred between Judge Houston and Chief Judge Byrd regarding any findings or conclusions in this case, either before or after Judge Byrd's retirement. The first appearance in the record of almost all of the detailed findings and conclusions included within the February 2021 order is the order itself, which bears Chief Judge Byrd's signature. As established by the cases from this Court and the Court of Appeals noted above, this gap in the record reveals a failure (intended or not) to uphold the requirements of Rules 52, 58, and 63 that a substitute judge act in a purely administrative and ministerial capacity.

¶ 58 Furthermore, there is a significant inconsistency between Judge Houston's statements during the August 2020 hearing and the legal conclusions reached in the February 2021 order that cast additional doubt on the order's validity under our Rules. Although Judge Houston plainly stated at the August 2020 hearing that she would *not* find grounds to terminate the father's parental rights for failure to pay a reasonable portion of the cost of care under subsection (a)(3), the February 2021 order *does* conclude that grounds exist to terminate the father's parental rights on that basis. This fundamental misalignment between Judge Houston's statements at the hearing and the February 2021 order raises significant concern about the origin of the order's findings and conclusions, and thus upon DSS's argument—and the majority's conclusion—that the order was signed in a purely administrative and ministerial capacity.

¶ 59 Instead of engaging in appropriate de novo review, the majority's erroneous presumption of regularity transforms the lack of evidence in the record from a liability to an asset. Whereas the majority rules under a presumption of regularity that "respondent failed to provide any evidence that Chief Judge Byrd improperly signed the order," respondent's entire argument before this Court revolves around the complete lack of evidence in the record showing that Judge Houston made the extensive,

formal factual findings and legal conclusions that first appear in the February 2021 order signed by Chief Judge Byrd. This is not to say that respondent had no burden at all before this Court. Rather, by adequately demonstrating the significant hole in the record here regarding the origin of the ultimate findings and conclusions, respondent met the burden on a de novo review: showing that when considered anew, the facts here illustrate that the February 2021 order fails to meet the requirements of Rules 52, 58, and 63, and is therefore invalid.

¶ 60 Second, the majority errs in concluding that Chief Judge Byrd's statement regarding the 28 August 2020 chambers "announcement" of factual findings and legal conclusions was unchallenged and therefore binding on appeal. In fact, respondent's *entire appeal* is premised upon explicitly and implicitly challenging the occurrence and validity of any in-chambers announcement based on its lack of direct evidence in the record. For instance, the sole argument heading in respondent's appellate brief asserts that the February 2021 order is invalid because "Judge Jeanie Houston had presided over the hearing on [25 August 2020], and had retired on [31 December 2020], *without making any findings of fact or conclusions of law*." (Emphasis added). This argument is implicitly and explicitly repeated and expounded upon throughout respondent's brief. For example:

- "The Honorable Jeanie Houston, presiding judge, in open court did not make a determination as to the best interests, but in the written order the chief district court judge, who had not heard the case, determined it to be in the best interest of Emily to terminate [respondent's parental] rights";
- "Nothing in the record indicates that the court ever conducted a further hearing, met with counsel to discuss the order, drafted an order, or that Judge Houston ever entered oral findings on either adjudication or disposition" ;
- "The record does not indicate who drafted the order or when it was drafted";
- "*[Chief] Judge Byrd* determined it to be in the best interests of Emily to terminate the rights of both parents" (emphasis added);
- "Since Judge Houston did not draft the order before retiring and did not enter any findings of fact or conclusions of law in open court,

[Chief] Judge Byrd did not sign the order in a ministerial function";

- "Since Judge Houston retired on [31 December 2020], and [Chief] Judge Byrd did not preside over the termination hearing the order signed by [Chief] Judge Byrd is a nullity";
- "This meeting may or may not have occurred. Nothing in the record speaks to it. If it did happen, nothing transpired in open court";
- "The court reporter and attorneys for [DSS and the guardian ad litem] assured [respondent's counsel] that no hearing occurred other than the hearing on [25 August 2020]";
- "The record is silent as to whether the parties drafted the order with the input of Judge Houston before her retirement";
- "[T]he record is silent about whether [Chief Judge Byrd] had the complete findings of Judge Houston";

¶ 61 To be sure, at no point in her brief does respondent state with exacting formality "I challenge Chief Judge Byrd's factual finding that Judge Houston announced findings of fact and conclusions of law in chambers on 28 August 2020." But she is not required to use any particular words; instead, it is more than sufficient for respondent to make implicitly and explicitly clear throughout her argument—indeed as the very premise of her appeal—that she challenges the validity of this finding. Just as the majority is perfectly able to determine that Chief Judge Byrd's statement is a finding of fact without it being formally labeled as such, it should likewise be able to determine that respondent explicitly and implicitly challenges this finding without her labeling it as such. Determining otherwise is erroneous.

¶ 62 Finally, the majority alternatively reasons that "even if respondent's brief is interpreted as challenging this finding, the finding is supported by the presumption of regularity, which respondent has failed to rebut." (Emphasis added). As above regarding Chief Judge Byrd's legal conclusion that he signed the order administratively and ministerially, this reasoning improperly applies a presumption of regularity where this Court has never done so before—this time, to a trial court's finding of fact. As above, this application is novel and erroneous.

¶ 63 When a trial court's finding of fact is challenged on appeal, this Court does not *presume* that the trial court properly found the fact; instead, it considers the record itself to determine whether the finding is indeed supported by competent evidence. *In re S.C.L.R.*, 378 N.C. 484, 2021-NCSC-101, ¶ 15. This standard of review requires a party challenging a trial court's factual finding to demonstrate that the finding is inadequately supported by the record, but does not begin the inquiry by tilting the scales against her through a presumption of regularity.

¶ 64 As above, this expansion of our presumption of regularity doctrine to apply to a trial court's challenged factual finding is ill-advised. In this case, it transforms the problem into the solution, reasoning that the glaring lack of record evidence indicates that respondent has failed to demonstrate irregularity when that same lack of evidence is what respondent challenges as irregular in the first place. More broadly, it applies newfound deference to a trial court's challenged findings of fact, which this Court properly reviews for competent evidence.

¶ 65 When properly reviewed for competent evidence, Chief Judge Byrd's finding here fails. As repeatedly pointed out by respondent, there is no direct evidence in the record to support Chief Judge Byrd's finding that Judge Houston ever made the extensive factual findings and legal conclusions stated in the February 2021 order signed by Chief Judge Byrd after Judge Houston's retirement. Further, the circumstantial evidence of Judge Houston's statement during the hearing that such a conversation *would* happen is significantly undermined by the fact that the one of the conclusions of law ultimately made in the February 2021 order is in direct conflict with the limited findings and conclusions she announced at the hearing. In short, Chief Judge Byrd's factual finding that the "findings of fact, conclusions of law, and decretal [were] announced in chambers on the 28th day of August 2020 by the Honorable Jeanie R. Houston" is not supported by competent evidence, and therefore must be rejected.

III. Conclusion

¶ 66 Our judicial process maintains credibility through transparency. Specifically, Rules 52 and 58 of our Rules of Civil Procedure require that the judge who presided over a non-jury hearing make sufficient factual findings and legal conclusions to support its ultimate ruling. If that judge is unavailable to issue that ultimate ruling, Rule 63 allows a substitute judge to issue it, but only if he or she is acting in a purely administrative and ministerial capacity—that is, if the original judge made the findings and conclusions, and the substitute judge is merely signing off on them.

¶ 67 Here, respondent has demonstrated that there is no competent evidence in the record showing that Judge Houston made the factual findings and legal conclusions that appear in the February 2021 order signed by Chief Judge Byrd. As a result, the findings do not support the legal conclusion that he signed the order "administratively and ministerially." Accordingly, I would vacate the order and remand the case back to the trial court to either make additional factual findings or conduct a rehearing.

¶ 68 In my view, the majority's error is twofold: first, the majority errs by applying a presumption of regularity to Chief Judge Byrd's statement that he was signing the order "administratively and ministerially." This Court has not applied such a presumption to such legal conclusions in the past, and should not do so here. Instead, this conclusion of law is properly reviewed by this Court de novo. De novo review reveals that there is no evidence in the record of Judge Houston ever making the extensive findings and conclusions stated in the February 2021 order. Indeed, one of the order's conclusions regarding grounds for termination directly contradicts Judge Houston's statements from the August 2020 hearing. Further, there is no evidence in the record that Judge Houston ever determined or declared that termination was in the best interests of the child. Accordingly, there is insufficient evidence regarding the origin of the order's findings and conclusions to show that the order was signed in a purely administrative and ministerial capacity. The order is therefore invalid under our Rules of Civil Procedure, and the majority errs in holding otherwise.

¶ 69 Second, the majority errs in concluding that the statement in the order regarding the alleged 28 August 2020 in-chambers announcement is an unchallenged—and therefore binding—finding of fact. In fact, respondent's entire appeal is premised upon implicitly and explicitly challenging this finding. Because no competent evidence in the record supports this finding, it should be disregarded, not upheld. Further, the majority's alternative application of a presumption of regularity to the trial court's factual finding again improperly applies a presumption of regularity where this Court has never done so before, with the effect of distorting the proper standard of review: whether the finding is supported by competent evidence. When properly reviewed under this standard, Chief Judge Byrd's finding fails and must be rejected.

¶ 70 For these reasons, I would hold that the February 2021 order is invalid, vacate the order, and remand the case to the trial court for additional findings of fact or a rehearing. Accordingly, I respectfully dissent.

Justice MORGAN and Justice EARLS join in this dissenting opinion.

IN RE M.K.

[381 N.C. 418, 2022-NCSC-71]

IN THE MATTER OF M.K.

No. 186A21

Filed 17 June 2022

Termination of Parental Rights—grounds for termination—neglect—likelihood of future neglect—case plan, domestic violence, and parenting skills

The trial court's order terminating respondent-mother's parental rights in her child on the ground of neglect was affirmed where, even after the factual findings that lacked evidentiary support were disregarded, the trial court's conclusion that respondent was likely to neglect her child in the future was supported by the remaining findings—including that she had failed to adequately make progress on her case plan, she continued to have issues with domestic violence, and she had failed to show any ability to parent appropriately.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) (2019) from an order entered 9 March 2021 by Judge J.H. Corpening, II, in District Court, New Hanover County. This matter was calendared for argument in the Supreme Court on 13 May 2022 but was determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Jane R. Thompson for petitioner-appellee New Hanover County Department of Social Services.

Poyner Spruill LLP, by Stephanie L. Gumm, for appellee Guardian ad Litem.

Benjamin J. Kull for respondent-appellant mother.

ERVIN, Justice.

¶ 1 Respondent-mother Onika G. appeals from the trial court's order terminating her parental rights in her minor child M.K.[1,2] After careful

1. M.K. will be referred to throughout the remainder of this opinion as "Marco," which is a pseudonym used for ease of reading and to protect the juvenile's identity.

2 The trial court also terminated the parental rights of Marco's father, Keshawn B., in Marco. In view of the fact that he did not note an appeal from the trial court's termination order, the father is not a party to the proceedings before this Court.

consideration of respondent-mother's challenges to the trial court's termination order in light of the record and the applicable law, we conclude that the trial court's order should be affirmed.

I. Background

¶ 2 Marco was born in January 2019 and has two older siblings, M.N., who was born in 2014, and M.G., who was born in 2017. The New Hanover County Department of Social Services had been attempting to help Marco's family address issues relating to mental health, domestic violence, parenting, and housing stability since May 2018, at which time the father of M.N. and M.G. had obtained the entry of a domestic violence order of protection against respondent-mother after she threatened him with a brick. In August 2018, respondent-mother was charged with assaulting a woman. Respondent-mother struggled to maintain housing and had moved multiple times. After completing a comprehensive clinical assessment on 14 November 2018, respondent-mother was diagnosed as suffering from mild persistent depressive disorder and intermittent explosive disorder, with the assessor having recommended that respondent-mother participate in outpatient therapy, medication management, transition management services, and "individual placement" to "support[ ] employment." However, respondent-mother failed to cooperate with the assessor's recommendations and only made minimal progress in attempting to comply with a case plan that had been developed for her by DSS.

¶ 3 On 22 February 2019, respondent-mother and Marco were staying with respondent-mother's aunt in New Hanover County. At 5:00 a.m. on that date, law enforcement officers responded to a domestic violence report originating from the aunt's residence. At the time that the officers arrived, respondent-mother had been locked out of her aunt's house and was arguing with her aunt through the door. The children were present during the incident, at the conclusion of which the officers arrested respondent-mother based upon outstanding warrants for failing to appear in court and violating a domestic violence order of protection. On the same date, DSS filed a juvenile petition alleging that Marco was a neglected juvenile and obtained the entry of an order placing him in nonsecure custody.[3]

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3. Although the two older children were also the subject of the initial neglect proceeding and were involved in certain other juvenile proceedings discussed in the text of this opinion, we will refrain from discussing the proceedings relating to M.N. and M.G. any further given that they were later placed in their father's custody and were not subjects of the termination proceeding that is before us in this case.

¶ 4 After a hearing held on 27 March 2019 following respondent-mother's release from pretrial detention on 22 March 2019, the trial court entered an order finding, based upon the evidence presented on that occasion and certain stipulations between the parties, that Marco was a neglected juvenile as defined in N.C.G.S. § 7B-101(15). Although the trial court found that respondent-mother had failed to cooperate with the recommendations that had been made during her clinical assessment, it also found that she had agreed with the assessor's recommendations and wished to pursue a plan of reunification. As a result, the trial court ordered respondent-mother to

> complete a psychological evaluation and comply with any and all recommendations. She shall comply with any and all recommendations received from her substance abuse treatment provider. She shall seek medication treatment from one medication provider and consume all medication as prescribed. She shall submit to random drug screens as requested by [DSS] and [the] Guardian ad Litem. She shall execute a release on behalf of [DSS] and Guardian ad Litem with all service providers. She shall obtain stable housing and verifiable income.

¶ 5 At a review hearing held on 5 June 2019, a report describing the results of a psychological evaluation conducted by Len Lecci, Ph.D., which had been completed on 1 May 2019, was admitted into evidence. Dr. Lecci diagnosed respondent-mother as suffering from bipolar II disorder and recommended that she receive a medication assessment, behavioral intervention, Dialectical Behavior Therapy group work, and one-on-one parenting education and that she apply for Section 8 housing assistance and social security disability benefits. At the time of the 5 June 2019 review hearing, respondent-mother lacked independent housing and was not employed. In a review order entered on 9 July 2019, the trial court found that respondent-mother had applied for social security disability benefits and Section 8 housing assistance and had expressed the intention to pursue medication management. The trial court authorized respondent-mother to have supervised visitation with Marco for two hours each week and allowed DSS to increase the frequency and duration of the respondent-mother's visits with Marco to the extent that respondent-mother complied with the provisions of her case plan.

¶ 6 After a permanency planning hearing held on 6 February 2020, the trial court entered an order on 27 February 2020 in which it determined that respondent-mother was utilizing mental health services provided

by the Physician Alliance for Mental Health (PAMH). On the other hand, the trial court found that respondent-mother denied that she had any responsibility for her untreated mental health difficulties and her lack of stable housing and that respondent-mother's "unwillingness to act on her own behalf [wa]s a significant barrier" to her ability to satisfy the requirements of her case plan. In addition, the trial court noted that DSS had concerns about respondent-mother's "ability to keep herself and her child[ ] safe"; observed that respondent-mother had "made threats of violence towards others;" described "accounts of physical violence towards others" and had made "videos of fights"; and pointed out that, even though respondent-mother had been authorized to have weekly supervised visitation with Marco, she had only done so "sporadically," having participated in six of the ten visits that had been scheduled between November 2019 and the date of the permanency planning hearing. Finally, the trial court noted that respondent-mother had met with DSS employees on 24 January 2020, that respondent-mother had acknowledged that she had a substance abuse problem at that time, and that, after acknowledging that she would test positive for marijuana, respondent-mother had refused to comply with a request that she submit to a random drug screen. In light of these and other findings of fact, the trial court ordered respondent-mother to comply with the terms of her case plan and established a primary permanent plan for Marco of reunification, with a secondary plan of adoption.

¶ 7 On 30 November 2020, the trial court entered another permanency planning order in the aftermath of a hearing that was held on 4 November 2020. At that time, the trial court determined that respondent-mother had failed to make adequate progress towards satisfying the requirements of her case plan within a reasonable amount of time. More specifically, the trial court determined that respondent-mother had consistently failed to engage in the services that had been recommended for her during the psychological evaluation that had been performed by Dr. Lecci and that her "unwillingness to act on her own behalf" continued to pose a significant barrier to her ability to satisfy the requirements of her case plan. The trial court also found that respondent-mother's "unwillingness to address her anger management issues continue[d] to put [Marco] at risk of harm" and posed yet another barrier to reunification.

¶ 8 The trial court found that respondent-mother had completed a comprehensive clinical assessment with PAMH in January 2020 and that PAMH had recommended that she receive a Community Support Team level of care. The trial court found that, after respondent-mother had been placed on a waiting list for such services, CST had contacted

respondent-mother in May 2020 for the purpose of addressing her "immediate stressors" — housing and employment. The trial court further noted that respondent-mother did not have a mental health treatment plan and that PAMH was not addressing respondent-mother's medication management or mental health therapy needs at that time.

¶ 9 The trial court determined that, by August 2020, respondent-mother was in the process of obtaining a psychiatric evaluation and transitioning her medication management to PAMH. The trial court noted that respondent-mother had made contradictory reports to social workers concerning the medications that she had been taking and that, while respondent-mother claimed that she had been taking her psychotropic medication as prescribed, she had been unable to identify the medication in question. The trial court found that, despite the fact that DSS and the guardian ad litem had repeatedly contacted PAMH for the purpose of obtaining information about the treatment that respondent-mother had been receiving, neither had received a response. In light of this set of circumstances and respondent-mother's failure to respond to inquiries that DSS had made to respondent-mother about her treatment, the trial court found that respondent-mother had "intentionally withh[eld] treatment information from [DSS] and [the] Guardian ad Litem."

¶ 10 Similarly, the trial court found that respondent-mother had failed to consistently submit to random drug screens in accordance with DSS requests and that visitation with respondent-mother had become a "negative experience" for Marco. Aside from the fact that she had only attended sixteen of thirty-three scheduled visits, respondent-mother had failed to exhibit appropriate parenting skills during the visits in which she did participate and had been unable to participate in needed one-on-one parenting instruction given her failure to consistently visit with Marco. Based upon these and other findings, the trial court determined that respondent-mother was "acting in a manner inconsistent with [Marco's] health and safety," ordered that termination of respondent-mother's parental rights in Marco be pursued, required respondent-mother to comply with the requirements of her case plan, and changed Marco's permanent plan to a primary plan of adoption and a secondary plan of reunification.

¶ 11 On 7 December 2020, DSS filed a petition seeking the termination of respondent-mother's parental rights in Marco on the basis of neglect, N.C.G.S. § 7B-1111(a)(1) (2021), and willfully leaving Marco in a placement outside of the home for more than twelve months without showing reasonable progress toward correcting the conditions that had led to Marco's removal from her care, N.C.G.S. § 7B-1111(a)(2) (2019).

After conducting a hearing concerning the issues raised by the termination petition on 1, 8, and 11 February 2021, the trial court entered an order on 9 March 2021 in which it found, among other things, that respondent-mother had had a fourth child, named R.T. in August 2020 and that respondent-mother had experienced ongoing domestic violence involving R.T.'s father since R.T.'s birth. In its termination order, the trial court found that both of the grounds for termination alleged in the termination petition existed and that termination of respondent-mother's parental rights would be in Marco's best interests. Respondent-mother noted an appeal to this Court from the trial court's termination order.

II. Analysis

¶ 12 A termination of parental rights proceeding consists of an adjudicatory stage and a dispositional stage. *See* N.C.G.S. § 7B-1109, -1110 (2019). During the adjudicatory stage, the trial court is required to determine whether any of the grounds for terminating a parent's parental rights delineated in N.C.G.S. § 7B-1111 exist, *see* N.C.G.S. § 7B-1109(e), with the petitioner having the obligation to establish the existence of any applicable grounds for termination by clear, cogent, and convincing evidence, *see* N.C.G.S. § 7B-1109(f). "We review a district court's adjudication under N.C.G.S. § 7B-1111(a) to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re J.S.*, 374 N.C. 811, 814 (2020) (cleaned up) (quoting *In re N.P.*, 374 N.C. 61, 62–63 (2020)). "Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." *In re B.R.L.*, 379 N.C. 15, 2021-NCSC-119, ¶ 11 (quoting *In re T.N.H.*, 372 N.C. 403, 407 (2019)). "A trial court's finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding." *In re A.L.*, 378 N.C. 396, 2021-NCSC-92, ¶ 16 (quoting *In re B.O.A.*, 372 N.C. 372, 379 (2019)). " '[T]he issue of whether a trial court's adjudicatory findings of fact support its conclusion of law that grounds existed to terminate parental rights pursuant to N.C.G.S. § 7B-1111(a)' is reviewed de novo by the appellate court." *In re M.R.F.*, 378 N.C. 638, 2021-NCSC-111, ¶ 7 (alteration in original) (quoting *In re T.M.L.*, 377 N.C. 369, 2021-NCSC-55, ¶ 15). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the trial court." *In re T.M.L.*, 377 N.C. 369, 2021-NCSC-55, ¶ 15 (cleaned up) (quoting *In re C.V.D.C.*, 374 N.C. 525, 530 (2020)). "[A]n adjudication of any single ground for terminating a parent's rights under N.C.G.S. § 7B-1111(a) will suffice to support a termination order." *In re M.S.*, 378 N.C. 30, 2021-NCSC-75, ¶ 21 (quoting *In re J.S.*, 374 N.C. at 815).

A. Findings of fact

¶ 13 In the brief that she filed before this Court, respondent-mother begins by arguing that portions of the following findings of fact lack sufficient evidentiary support:

> 8. During the ongoing services treatment case in 2018, [respondent-mother] struggled to maintain stable housing for herself and her children. Housing instability remained an issue at [Marco]'s birth in 2019, and [respondent-mother] moved multiple times and between counties. She resided in domestic violence shelters in Wake County and Pender County prior to [Marco]'s removal. She was involuntarily discharged from a domestic violence shelter in Pender County due to her behaviors and subsequently relocated to New Hanover County where she resided with a relative.
>
> 9. On February 22, 2019, law enforcement responded to a 911 call regarding a domestic violence incident at 5:00 a.m. [Respondent-mother] was locked out of [a] maternal aunt['s] home, and [the maternal aunt] would not allow her into the home. [Respondent-mother] and [the maternal aunt] . . . argued through the door, and [respondent-mother] threatened to kill [the maternal aunt]. Law enforcement responded. The children were present during the incident. Respondent-mother had outstanding warrants for failure to appear and violation of a domestic violence protection order, and she was arrested.
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> . . . .
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> 11. [Respondent-mother] failed to focus on making an appropriate plan for her children and was only focused on getting released from jail.
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> . . . .
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> 16. At the inception of [Marco]'s foster care case, [respondent-mother] entered into a Family Services Agreement that included obtaining and maintaining stable housing, obtaining and maintaining verifiable employment, submitting to a psychological evaluation, submitting to random drug screens and

maintaining an executed release with all service providers on behalf of [DSS] and [the] Guardian ad Litem.

17. [Respondent-mother] has failed to maintain safe and suitable housing for herself and [Marco] for any prolonged period of time. She has resided with various relatives including [the maternal aunt], [the maternal grandmother] and the maternal grandfather. [Respondent-mother] obtained independent housing for a short period of time with the assistance of [PAMH] and the Back @ Home Program. She obtained a lease agreement for a residence [on] . . . 9th Street, Wilmington, North Carolina. The lease term was from August 2020 to July 31, 2021. She failed to maintain this residence due to ongoing domestic violence with [R.T.'s father]. After leaving the . . . house, she resided at a hotel with the assistance of Open Gate due to a domestic violence incident.

18. [Respondent-mother] recently relocated to . . . S. Kerr Avenue, Wilmington, North Carolina. She occupies one bedroom in the home, while she shares the living room, kitchen and laundry area with two unidentified males. She does not like her current living arrangement and is seeking alternate housing. She is currently behind on her rent payments.

. . . .

20. [Respondent-mother] failed to complete her application for Social Security Benefits as recommended in her psychological evaluation, however, she plans to apply in the near future. Caseworkers at SSI/SSDI Outreach, Access and Recovery (SOAR) and staff with PAMH will be assisting in filling out the required paperwork.

21. Domestic violence remains a barrier to reunification.

22. [Respondent-mother] acknowledged pulling a knife on [M.N. and M.G.'s father] in December 2019. During the altercation, [respondent-mother] was stabbed and sustained injuries requiring staples in her head.

23. [Respondent-mother] has been involved in a relationship with [R.T.'s father] for many years. Their relationship has been riddled with domestic violence since the birth of [respondent-mother]'s daughter in August 2020. [R.T.'s father] has spat on [respondent-mother], choked her and cut her forehead and face. She had altercations with a boyfriend in May 2020, July 2020, July [sic] 2020 and September 2020. In December 2020, [R.T.'s father] busted windows out and kicked the door in at her home.

. . . .

27. On May 1, 2019, [respondent-mother] completed a psychological evaluation with [Dr. Lecci]. During her evaluation with Dr. Lecci, she reported difficulty maintaining employment. She has been fired from every job she obtained. She acknowledged the need for medication management, however, at the time of the evaluation and for months thereafter, she failed to take medication to address her mental health issues. She obtained a Full Scale IQ of 77. This IQ score is described as borderline to low average cognitive functioning. She has intact intellectual capacities, but some of her biggest weaknesses are verbal ability and working memory. Her weaknesses will likely result in her presenting as less cognitively intact and can lead to functional problems.

. . . .

29. [Respondent-mother] failed to consistently address her mental health needs throughout [Marco]'s case. Eleven months into [Marco]'s foster care case, [respondent-mother] finally engaged with [PAMH]. In January 2020, PAMH began assisting [respondent-mother] with obtaining stable housing as it was her most immediate basic need. No additional therapeutic were provided at that time.

. . . .

31. [Respondent-mother] is engaged with the [CST] at PAMH. Danielle Dest, MSW, LCSW is the [CST] Lead. Ms. Dest has monthly contact

> with [respondent-mother]. The frequency in which [respondent-mother] is seen is dependent on her current need and circumstances. [Respondent-mother] has frequent contact with multiple professionals employed by PAMH. Ms. Dest has used DBT techniques in her interactions with [respondent-mother]. PAMH is not offering DBT groups during the COVID-19 pandemic so [respondent-mother] is not currently involved in DBT groups. [Respondent-mother] is engaged weekly by staff to address specific treatment goals. [Respondent-mother]'s years of involvement in the system as a child and young adult have created a mistrust which has been a challenge to overcome in her treatment. Much of PAMH staff's time with [respondent-mother] revolves around crisis management.
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> . . . .
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> 38. During visitations with [Marco], [respondent-mother] was observed being verbally abusive to [Marco] during at least seven visits attended. She has been observed mocking [Marco], calling him names and telling him she is leaving the visits due to his behavior. She was observed by [DSS] calling [Marco] "fat," "weak," and "soft." She often talks on her cellphone during the visit while [Marco] cries unattended or entertains himself. [Respondent-mother] is unable to appropriately parent for two hours. [DSS] has been unable to expand visitation as to frequency, duration or level of supervision due to [respondent-mother]'s lack of progress.

We will analyze each of respondent-mother's challenges to the sufficiency of the evidentiary support for these findings of fact in turn.

¶ 14 As an initial matter, respondent-mother asserts that the statements in Finding of Fact No. 8 that she "was involuntarily discharged from a domestic violence shelter in Pender County due to her behaviors" and that she "resided in domestic violence shelters in Wake County and Pender County prior to Marco's removal" conflicted with the record evidence. At the termination hearing, Joshua Barton, a social worker employed by DSS, testified that, before Marco was taken into nonsecure custody, respondent-mother "had been in shelters in Wake County and

Pender County." In addition, the trial court took judicial notice of the orders that had been previously entered with respect to the children, *see In re A.C.*, 378 N.C. 277, 2021-NCSC-91, ¶ 17 (stating that "a trial court may take judicial notice of findings of fact made in prior orders, even when those findings are based on a lower evidentiary standard[,] because[,] where a judge sits without a jury, the trial court is presumed to have disregarded any incompetent evidence and relied upon the competent evidence," (first alteration in original) (quoting *In re T.N.H.*, 372 N.C. 403, 410 (2019)), with the 22 April 2019 adjudication and disposition order having noted, based upon a stipulation between the parties, that respondent-mother had been "involuntarily discharged from a domestic violence shelter in Pender County." As a result, while the record does contain evidence tending to support most of the information contained in Finding of Fact No. 8, we are unable to identify any support for the trial court's finding that respondent-mother had been involuntarily discharged from the Pender County shelter "due to her behaviors," and will disregard this portion of Finding of Fact No. 8 in determining whether the trial court's findings support its conclusion that respondent-mother's parental rights in Marco were subject to termination. *In re J.M.J.-J.*, 374 N.C. 553, 559 (2020) (disregarding adjudicatory findings of fact not supported by clear, cogent, and convincing evidence).

¶ 15 Next, respondent-mother argues that the statement contained in Finding of Fact No. 9 that she "threatened to kill" her aunt lacks sufficient evidentiary support. Once again, we agree that the record does not contain evidence tending to show that respondent-mother threatened to kill the aunt at the time of the incident that ended in respondent-mother's arrest and Marco's placement in foster care. For that reason, we will disregard the trial court's determination that respondent-mother "threatened to kill" her aunt on that occasion in evaluating the extent to which the trial court's findings support its conclusion that respondent-mother's parental rights were subject to termination. *See In re J.M.J.-J.*, 374 N.C. at 559.

¶ 16 In addition, respondent-mother asserts that the trial court's statement in Finding of Fact No. 11 that, following her arrest on 22 February 2019, respondent-mother "failed to focus on making an appropriate plan for her children and was only focused on getting released from jail" has insufficient support in the evidentiary record. At the termination hearing, Mr. Barton testified that he spoke with respondent-mother at the New Hanover County jail on the day of her arrest for the purpose of discussing "her children and what she wanted to do as far as placement." According to Mr. Barton, "[respondent-mother's] main focus [during

that conversation] was getting out of jail" given that "[s]he felt like she was getting out of jail that day and going to her mother's residence." Although respondent-mother argues that the fact that "[h]er main focus" was on getting out of jail does not support a finding that release from incarceration was her "only" focus, "it is well-established that a district court 'ha[s] the responsibility to pass[ ] upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom.' " *In re A.R.A.*, 373 N.C. 190, 196 (2019) (alterations in original) (quoting *In re D.L.W.*, 368 N.C. 835, 843 (2016)). After carefully examining Mr. Barton's testimony, we conclude that it supports the trial court's inference that, following her arrest on 22 February 2019, respondent-mother "was only focused on getting released from jail." *See In re A.L.*, ¶ 16; *In re A.R.A.*, 373 N.C. at 196. Thus, we hold that respondent-mother's challenge to the sufficiency of the record support for Finding of Fact No. 11 lacks merit.

¶ 17 In the same vein, respondent-mother argues that the description of her case plan contained in Finding of Fact No. 16 as requiring that she obtain and maintain "stable housing" is not supported by the record evidence. In attempting to persuade us of the merits of this contention, respondent-mother points to testimony by George Colby, a DSS social worker, describing respondent-mother's case plan as requiring that she obtain "safe and appropriate" housing and contends that "safe and appropriate" housing is not the same thing as "stable" housing. However, the trial court ordered respondent-mother to obtain "stable" housing in the 22 April 2019 adjudication and disposition order, the 9 July 2019 review order, and the 27 February 2020 permanency planning order. *See In re A.C.*, ¶ 17. As a result, we hold that the trial court's description of respondent-mother's case plan as requiring her to obtain "stable" housing has sufficient record support.

¶ 18 In addition, respondent-mother contends that the trial court erred by stating in Finding of Fact No. 16 that her case plan required her to obtain "verifiable employment" in light of the fact that Mr. Colby testified that respondent-mother's case plan mandated that she obtain "[l]egal income which would have at any point included social security." In respondent-mother's view, the trial court's finding that her case plan required her to obtain "verifiable employment" "improperly disregard[s] the contemplated option that her income could take the form of social security benefits." We note, however, that the trial court stated in its 27 February 2020 permanency planning order that respondent-mother should "comply with the terms of her Family Services Agreement[ ] . . . [and] obtain and maintain . . . verifiable employment." *See In re A.C.*,

¶ 17. In addition, the record contains no evidence tending to show that respondent-mother ever received social security benefits. As a result, we hold that respondent-mother's remaining challenge to Finding of Fact No. 16 lacks merit as well.

¶ 19 Similarly, respondent-mother argues that the trial court erroneously stated in Finding of Fact No. 17 that, "[a]fter leaving the 9th Street house, she resided at a hotel with the assistance of Open Gate" on the grounds that the record contains no evidence tending to show that respondent-mother resided at a hotel during this period of time. However, the record reflects that the term of respondent-mother's lease at the 9th Street residence ran from August 2020 until 31 July 2021, that Mr. Colby testified that respondent-mother had utilized the services of Open Gate to find housing in September 2020, and that, after respondent-mother moved out of the 9th Street residence, Mr. Colby "picked [respondent-mother] up from a motel" that he thought "was likely provided by Open Gate but I was not aware of that at the time." In addition, Melissa Ellison, who served as Marco's guardian ad litem, testified that respondent-mother's residential history included periods during which she lived at "various hotels" using assistance provided by Open Gate. In light of this evidence, the trial court's inference that respondent-mother resided in a hotel after vacating her residence on 9th Street has ample record support. *See In re A.L.*, ¶ 16; *In re A.R.A.*, 373 N.C. at 196.

¶ 20 Furthermore, respondent-mother argues that the trial court's statement in Finding of Fact No. 18 that she "is currently behind on her rent payments" is devoid of evidentiary support on the theory that the record only reflected that her rent was one month, rather than multiple months, in arrears. A careful review of the record reflects that, when asked if respondent-mother was able to make or was current on her rent payments, Ms. Dest with the CST team at PAMH testified that "I know that [respondent-mother] is late currently on a payment" by about a month "give or take." As a result, while we agree with respondent-mother that the record evidence does not tend to show that she was more than one month behind on her rent payments, we further conclude that the evidence does suffice to support a determination that respondent-mother was behind on her rent payments. *See In re A.L.*, ¶ 16. For that reason, we hold that this aspect of respondent-mother's challenge to the trial court's termination order lacks merit.

¶ 21 Moreover, respondent-mother challenges the sufficiency of the evidentiary support for the trial court's statement in Finding of Fact No. 20 that she "failed to complete her application for Social Security Benefits."

In arguing that the record does not contain evidence tending to show that she "failed to complete her application," respondent-mother directs our attention to the orders that the trial court entered on 9 July 2019 and 30 November 2020 finding that respondent-mother had applied for social security disability benefits. In addition, we note that respondent-mother testified at the termination hearing that she had submitted her disability application and that, according to Dr. Lecci, her application had been approved. Finally, the record reflects that Ms. Dest testified that respondent-mother's application for social security benefits had been referred to SOAR, a nonprofit advocacy organization that "supports an individual who is applying for disability," and described respondent-mother's application for social security disability benefits as "a work in process." Thus, given that the record does not contain any evidence tending to show that respondent-mother had "failed to complete her application for Social Security Benefits," we will disregard this portion of Finding of Fact No. 20 in determining whether the trial court's findings of fact support a determination that her parental rights in Marco were subject to termination. *See In re J.M.J.-J.*, 374 N.C. at 559.

¶ 22 Similarly, respondent-mother challenges the trial court's statement in Finding of Fact No. 21 that "[d]omestic violence is a barrier to reunification" on the grounds that this statement is, in reality, a conclusion of law or an ultimate finding of fact that has no legitimate bearing upon the issue of whether her parental rights in Marco were subject to termination. In view of the fact that respondent-mother has not contended that the challenged portion of Finding of Fact No. 21 lacks sufficient record support, that finding is binding upon us for purposes of appellate review. *See In re B.R.L.*, ¶ 11 (stating that "[f]indings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal"). As a result, we will address respondent-mother's contentions concerning the relevance of her domestic violence-related problems in the portion of this opinion that discusses the extent to which respondent-mother's parental rights in Marco were subject to termination.

¶ 23 In addition, respondent-mother argues that the trial court's statement in Finding of Fact No. 22 that she had "acknowledged pulling a knife on [M.N. and M.G.'s father] in December 2019" was not supported by the evidentiary record. At the termination hearing, the guardian ad litem testified that the father of M.N. and M.G. had sought to obtain a domestic violence order of protection against respondent-mother after "she had pulled a knife on him and his family." In discussing this aspect of the guardian ad litem's testimony, respondent-mother testified that

"[t]hat was around the time that [the guardian ad litem] said I pulled a knife to him which . . . had to be December of 2019." Although the record does contain evidence tending to show that respondent-mother had threatened the father of M.N. and M.G. with a knife, it does not indicate that she ever acknowledged having done so. For that reason, we will disregard the portion of Finding of Fact No. 22 stating that respondent-mother had acknowledged pulling a knife on M.N. and M.G.'s father in determining whether the trial court's findings support a conclusion that her parental rights in Marco were subject to termination. *In re J.M.J.-J.*, 374 N.C. at 559.

¶ 24 Next, respondent-mother argues that the trial court's statement in Finding of Fact No. 23 that she "has been involved in a relationship with [R.T.'s father] for many years" lacks sufficient record support given that the challenged finding implies that she continued to be involved in a romantic relationship with R.T.'s father at the time of the termination hearing. At the termination hearing, respondent-mother testified that she had been involved in a romantic relationship with R.T.'s father "ever since [she] was [fourteen years old]" and that, while the two of them were "together" at the time of Marco's birth, their relationship had ended by the time that respondent-mother gave birth to R.T. in 2020. As a result, given the absence of any evidence tending to show that respondent-mother continued to be romantically involved with R.T.'s father at the time of the termination hearing, we will disregard Finding of Fact No. 23 to the extent that it can be construed to mean that the relationship between respondent-mother and R.T.'s father was ongoing at the time of the termination hearing in determining whether respondent-mother's parental rights in Marco were subject to termination. *In re J.M.J.-J.*, 374 N.C. at 559.

¶ 25 Furthermore, respondent-mother argues that the trial court erred by stating in Finding of Fact No. 23 that she had "had altercations with a boyfriend in May 2020, July 2020, July [sic] 2020 and September 2020" on the grounds that the record provided insufficient support for this finding. However, Mr. Colby testified that respondent-mother had utilized Open Gate to find housing in May, June, July, and September 2020, as the result of incidents in which she had been involved with a boyfriend and the guardian ad litem testified that, "a couple of times throughout 2020," respondent-mother sought shelter as the result of domestic violence perpetrated by R.T.'s father. Thus, we hold that the record contains sufficient support for an inference that respondent-mother had "had altercations" with a boyfriend in May, July, and September 2020. *See In re A.L.*, ¶ 16; *In re A.R.A.*, 373 N.C. at 196.

¶ 26 In the same vein, respondent-mother challenges the sufficiency of the evidentiary support for the trial court's statement in Finding of Fact No. 27 that she had "acknowledged the need for medication management" during her 1 May 2019 psychological evaluation. As we read the relevant portion of the record, while respondent-mother did acknowledge a general need for treatment on that occasion, there is no evidentiary support for the trial court's determination that respondent-mother had acknowledged a need for medication management at that time. For that reason, we will disregard the challenged portion of Finding of Fact No. 27 in evaluating the extent to which respondent-mother's parental rights in Marco were subject to termination. *In re J.M.J.-J.*, 374 N.C. at 559.

¶ 27 Similarly, respondent-mother argues that the trial court erred by determining in Finding of Fact No. 29 that respondent-mother had "failed to consistently address her mental health needs throughout [Marco]'s case." According to respondent-mother, the undisputed record evidence demonstrates that she sought out and received services for the purposes of addressing her mental health difficulties. We note, however, that respondent-mother has failed to challenge the sufficiency of the evidentiary support for the trial court's findings that "[she] was diagnosed with Intermittent Explosive Disorder several years ago," that DSS had provided services to respondent-mother for the purpose of addressing her mental health problems in May 2018, and that, "[a]t the time of [Marco]'s removal [in February 2019], [respondent-mother] was not participating in medication management or therapy to address her mental health issues."

¶ 28 The record further reflects that the trial court had directed respondent-mother to complete a psychological evaluation and comply with any and all treatment recommendations in its initial adjudication and disposition order and that Dr. Lecci's subsequent report indicated that respondent-mother suffered from bipolar II disorder and a long-standing mood disorder. According to Dr. Lecci, respondent-mother should receive a medication assessment relating to her bipolar II disorder and might benefit from a behavioral intervention other than "traditional psychotherapy" and the availability of a social support network. Although Dr. Lecci observed that respondent-mother's behavioral issues had previously been treated with anti-psychotics, "which would have a sedating effect and could have minimized the consequences of both psychiatric instability and attention deficits," the trial court found that, "at the time of the [1 May 2019] evaluation and for months thereafter,

[respondent-mother] failed to take medication to address her mental health issues."

¶ 29 In addition, the record contains evidence tending to show that respondent-mother had begun to receive treatment at PAMH in January 2020 "and then there [had been] a large period of lull maybe in part [due to] the pandemic" before respondent-mother re-engaged with PAMH in June or July 2020. As a result, respondent-mother began receiving medication management services and participated in a psychiatric evaluation at PAMH in October 2020, which was only four months before the termination hearing was held. Thus, in light of the extensive evidence describing the nature and extent of respondent-mother's episodic participation in recommended mental health treatment, we hold that the record provides ample support for the trial court's finding that she "failed to consistently address her mental health needs throughout [Marco]'s case." *See In re A.L.*, ¶ 16.

¶ 30 Respondent-mother also argues that the trial court's statement in Finding of Fact No. 31 that "[m]uch of PAMH staff's time with [respondent-mother] revolves around crisis management" lacks sufficient record support. At the termination hearing, Ms. Dest acknowledged that, when respondent-mother first sought assistance from PAMH in January 2020, it was "dealing with her housing crisis." In addition, Ms. Dest explained that, while respondent-mother's "service definition allow[ed] up to four hours per week of any type of service delivery[,] . . . in circumstances in which there are needs such as housing or crisis, we do have the ability to engage more frequently to address and to assist in individual stabilizing." According to both Ms. Dest and respondent-mother, respondent-mother contacted PAMH on a daily basis during this period, with Ms. Dest having stated that PAMH "maximize[d] [its] time with [respondent-mother]." Moreover, Ms. Dest described respondent-mother as having a "propensity for impulsive decisions without thinking about the potential consequences" and stated that "we're still at a phase in which we want to continue to support [respondent-mother] in lowering that stress level so it provides us an opportunity to do something different; to make other decisions." Finally, Mr. Colby testified that, as of mid-September 2020, PAMH was "only mitigating crisis [sic] at the time." As a result, we have no difficulty in concluding that the trial court's finding that PAMH's work with respondent-mother "revolves around crisis management" constituted a reasonable inference from the record evidence. *See In re A.R.A.*, 373 N.C. at 196.

¶ 31 Next, respondent-mother argues that the trial court's statement in Finding of Fact No. 38 that respondent-mother was "verbally abusive

to [Marco] during at least seven visits [she] attended" had insufficient support in the record evidence. As an initial matter, respondent-mother contends that the record does not contain any evidence indicating the number of occasions upon which she was verbally abusive to Marco. However, the trial court found in the 30 November 2020 permanency planning review order that "[respondent-mother] was observed being verbally abusive to [Marco] during seven of the last sixteen visits attended." *See In re A.C.*, ¶ 17. In addition, after acknowledging that the record contained evidence tending to show that she had called Marco "fat," "weak," and "soft," respondent-mother contends that the trial court's description of her conduct as "verbally abusive" constitutes "an improper conclusion of law, to the extent it is a determination that [respondent-mother] abused her son," with "it def[ying] reason to conclude that conduct such as this could possibly rise to the level of abuse, given that parents have a constitutionally protected right to physically punish their children hard enough to leave a bruise." We do not, however, interpret the trial court's reference to "verbal abuse" as any sort of shorthand assertion that respondent-mother's comments sufficed to make Marco an "abused juvenile," *see* N.C.G.S. § 7B-101(1) (2019) (defining "abused juvenile," in part, as a juvenile "whose parent . . . [c]reates or allows to be created serious emotional damage to the juvenile" as "evidenced by a juvenile's severe anxiety, depression, withdrawal, or aggressive behavior toward himself or others"), although Mr. Colby did testify that, while respondent-mother's descriptions of Marco as "soft," "a crybaby," and "fat" could have been said "jovially, in a joking manner," those statements were, in actuality, "part of an escalation of frustration." Thus, we hold that the trial court's finding concerning the number of occasions upon which respondent-mother made inappropriate comments to Marco and its description of those statements as "verbal abuse" had ample record support. *See In re A.R.A.*, 373 N.C. at 196. As a result, after carefully examining the record, we hold that some of respondent-mother's challenges to the trial court's findings have merit and will disregard the relevant findings in determining whether the trial court's findings of fact supported its determination that respondent-mother's parental rights in Marco were subject to termination.

B. Neglect

¶ 32 Subsection 7B-1111(a)(1) provides that a trial court is authorized to terminate a parent's parental rights in his or her child in the event that the child is a neglected juvenile as that term is defined in G.S. 7B-101. N.C.G.S. § 7B-1111(a)(1) (2021). According to N.C.G.S. § 7B-101(15) (2019), a neglected juvenile is, among other things, one "whose parent

. . . does not provide proper care, supervision, or discipline . . . or who lives in an environment injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2019).[4]

¶ 33 A court may terminate a parent's parental rights in a child based upon neglect occurring at the time of the termination hearing. *See, e.g.*, *In re K.C.T.*, 375 N.C. 592, 599–600 (2020) (stating that "this Court has recognized that the neglect ground can support termination . . . if a parent is presently neglecting their child by abandonment"). On the other hand, in the event that the child has not been in the parent's custody for a significant period of time prior to the termination hearing, a decision to "requir[e] the petitioner . . . to show that the child is currently neglected by the parent would make termination of parental rights impossible." *In re N.D.A.*, 373 N.C. 71, 80 (2019) (quoting *In re L.O.K.*, 174 N.C. App. 426, 435 (2005). In such circumstances, a trial court is entitled to consider "evidence of neglect by a parent prior to losing custody of a child — including an adjudication of such neglect" — along with "any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *In re Ballard*, 311 N.C. 708, 715 (1984). "When determining whether such future neglect is likely, the district court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing." *In re Z.V.A.*, 373 N.C. 207, 212 (2019) (citing *In re Ballard*, 311 N.C. at 715).

¶ 34 In its termination order, the trial court determined that respondent-mother had neglected Marco and that "the likelihood of repetition of neglect [was] high." Although respondent-mother does not challenge the validity of the trial court's conclusion that she had neglected

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4. The General Assembly amended the definition of a "neglected juvenile," N.C.G.S. § 7B-101(15), by enacting Session Law 2021-132, effective 1 October 2021, with the new definition being applicable "to actions filed or pending on or after that date." Act of Sept. 1, 2021, S.L. 2021-132, § 1(a), 2021 N.C. Sess. Laws 165, 165, 170. As a result, the definition of a "neglected juvenile" now encompasses:

> Any juvenile less than 18 years of age . . . (ii) whose parent, guardian, custodian, or caretaker does any of the following:
>
> a. Does not provide proper care, supervision, or discipline.
>
> . . . .
>
> e. Creates or allows to be created a living environment that is injurious to the juvenile's welfare.

N.C.G.S. § 7B-101(15) (2021).

Marco in the past, she does argue that the trial court's findings failed to support a conclusion that she was likely to neglect Marco in the future. According to respondent-mother, the trial court's findings show that she made reasonable progress in satisfying the requirements of her case plan and that the amount of progress that she made suffices to preclude a determination of future neglect. We do not find respondent-mother's argument persuasive.

¶ 35 "A parent's failure to make progress in completing a case plan is indicative of a likelihood of future neglect." *In re S.R.F.*, 376 N.C. 647, 2021-NCSC-5, ¶ 25 (quoting *In re M.A.*, 374 N.C. 865, 870 (2020)). On the other hand, however, "[a]s this Court has previously noted, a parent's compliance with his or her case plan does not preclude a finding of neglect." *In re J.J.H.*, 376 N.C. 161, 185 (2020) (citing *In re D.W.P.*, 373 N.C. 327, 339–40 (2020) (noting the parent's progress in satisfying the requirements of her case plan while upholding the trial court's determination that there was a likelihood that the neglect would be repeated in the future given that the parent had failed "to recognize and break patterns of abuse that put her children at risk")). A careful review of the record satisfies us that the trial court had ample justification for finding a likelihood of future neglect in the event that Marco was returned to respondent-mother's care.

¶ 36 The case plan that respondent-mother entered into with DSS and with which the trial court ordered respondent-mother to comply included completing a psychological evaluation and following "any and all recommendations," obtaining and maintaining stable housing and verifiable employment, and submitting to random drug screens as requested. As the trial court's findings of fact reflect, respondent-mother failed to consistently address her mental health needs throughout the period of time during which Marco remained in foster care and continued to struggle with mental health issues at the time of the termination hearing. At the time of Marco's removal from her home, respondent-mother was not participating in medication management or therapy despite the fact that such services had been recommended in her clinical assessment. Although respondent-mother had acknowledged her need for assistance and the efficacy of taking psychotropic medications, she did not take her prescribed medication "for months" following her evaluation and did not consistently take the prescribed medication for the majority of the interval between Marco's placement in foster care and the date of the termination hearing. Similarly, respondent-mother failed to engage with PAMH until eleven months after Marco entered foster care and did not obtain a psychiatric evaluation from and participate in medication management

with PAMH until October 2020. According to a comprehensive clinical assessment that PAMH completed less than a week before the termination hearing began, respondent-mother suffered from "Post Traumatic Stress Disorder, Intermittent Explosive Disorder, Major Depressive Disorder, recurrent, moderate, Generalized Anxiety Disorder, Cannabis Use Disorder, mild, Unspecified Housing or Economic Problem, Other Problem Related to Employment, Academic or Educational Problems and Unspecified Problem Related to Social Environment." As a result, the trial court's findings reflect that respondent-mother had failed to adequately address the mental health problems that contributed to Marco's placement in foster care.

¶ 37 Similarly, respondent-mother failed to maintain safe and suitable housing or verifiable employment for any significant portion of the time after Marco's removal from her home. At the time of the termination hearing, respondent-mother was behind on her rent payments, was seeking alternative housing and lacked employment, with nothing in the present record tending to show that respondent-mother's inability to care for Marco stemmed solely from respondent-mother's poverty. In addition, respondent-mother's continued struggles with domestic violence had caused her to lose employment and independent housing within six months of the termination hearing. Finally, respondent-mother failed to submit to several requested drug screens in accordance with the requirements of her case plan. Thus, for all of these reasons, we hold that the trial court's order refutes respondent-mother's contention that she had made reasonable progress in satisfying the requirements of her case plan as of the date of the termination hearing.

¶ 38 As part of her challenge to the trial court's finding of a likelihood of future neglect, respondent-mother argues that the trial court's findings of fact relating to the issue of domestic violence fail to support the trial court's determination that future neglect of Marco was likely and that the trial court's determination that domestic violence constituted a barrier to respondent-mother's reunification with Marco was not relevant to the making of its termination decision given that concerns about domestic violence had not been a part of the basis for the trial court's original decision to adjudicate Marco as a neglected juvenile and given that domestic violence-related concerns had not been mentioned in respondent-mother's case plan, her psychological evaluation, or any prior court order. According to respondent-mother, "[a]ny past domestic violence was simply never serious enough to compel [DSS] or the court to require [her] to specifically address it in this case." We do not find respondent-mother's domestic violence-related argument to be persuasive.

¶ 39 "Termination of parental rights proceedings are not meant to be punitive against the parent, but to ensure the safety and wellbeing of the child." *In re D.W.P.*, 373 N.C. 327, 340 (2020) (citing *In re Montgomery*, 311 N.C. 101, 109 (1984) (recognizing that the determinative factors in deciding whether a child is neglected are the circumstances and conditions surrounding the child rather than the culpability of the parent)). At a hearing held in a proceeding in which a parent's parental rights in a child are sought to be terminated on the basis of neglect pursuant to N.C.G.S. § 7B-1111(a)(1), "the trial court must admit and consider all evidence of relevant circumstances or events which existed or occurred either before or after the prior adjudication of neglect." *In re M.A.W.*, 370 N.C. 149, 153 (2017) (emphasis omitted) (quoting *Ballard*, 311 N.C. at 716). For that reason, even if domestic violence-related concerns had not constituted a basis for the trial court's initial determination that Marco was a neglected juvenile, the trial court was required to consider respondent-mother's domestic violence problems in determining whether Marco was likely to suffer a repetition of neglect if he was returned to respondent-mother's care. *See generally id.* at 153–54 (affirming the termination of the respondent-father's parental rights in a case in which the adjudication of neglect was based upon the mother's conduct prior to the establishment of the respondent-father's paternity and the conclusion that the juvenile was likely to be neglected in the future was supported by respondent-father's long history of criminal activity and substance abuse); *In re C.L.S.*, 245 N.C. App. 75 (affirming the termination of a father's parental rights on the basis of neglect in a case in which the father was incarcerated and paternity had not been established until after a prior adjudication of neglect that rested upon substance abuse by the mother), *aff'd per curiam*, 369 N.C. 58 (2016). As a result, even if concerns related to the domestic violence in which respondent-mother was ensnared had not helped precipitate the initial adjudication of neglect, those concerns could still support a determination that future neglect was likely in the event that Marco was returned to respondent-mother's care.

¶ 40 In addition, domestic violence-related concerns did contribute to Marco's adjudication as a neglected juvenile and the fact that Marco had remained in foster care from the entry of the nonsecure custody order until the date upon which the termination hearing was held. As the record reflects, respondent-mother stipulated to a history of domestic violence that preceded Marco's placement in foster care in advance of the initial adjudication order.[5] Moreover, the record reflects that Marco

5. We do not wish to be understood as implying that the fact that respondent-mother was a victim of domestic violence, without more, supports a determination that her parental

was taken into DSS custody after an incident of domestic violence occurred at the home of a relative at a time when Marco and his siblings were present, with respondent-mother having been placed under arrest for, among other things, violating a domestic violence order of protection at the conclusion of that incident. On the same day, a social worker approached respondent-mother for the purpose of discussing her "continuing domestic violence issues." In its termination order, the trial court found that respondent-mother "has a history of abusive relationships with the fathers of her children" and that her relationship with R.T.'s father had been "riddled with domestic violence" since R.T.'s birth in August 2020, which was only six months prior to the termination hearing. In addition, the trial court found that respondent-mother "has a severe and persistent mental illness that affects her functioning during periods of psychiatric deterioration," that "[h]er mood is easily affected by any change she experiences," and that "she has a propensity to react strongly and out of proportion to triggering events." Simply put, the trial court's determination that domestic violence remained a barrier to the success of any efforts to reunify respondent-mother with Marco has ample evidentiary support and reflects nothing more than a recognition that respondent-mother's struggle with domestic violence-related problems constituted an ongoing obstacle to her ability to reunite with Marco. *See In re M.A.W.*, 370 N.C. at 153.

¶ 41 Finally, the trial court found that respondent-mother had failed to consistently and appropriately participate in visitation with Marco and that DSS had been unable to expand the "frequency, duration or level of supervision due to [respondent-mother]'s lack of progress." Aside from the fact that respondent-mother only attended half of her scheduled visits with Marco, she was "unable to appropriately parent for [a] two hour [ ] [visitation period,]" having mocked and verbally abused Marco during certain of the visits that she did attend.

¶ 42 Thus, the trial court's findings that respondent-mother had failed to make adequate progress in satisfying the requirements of her case plan, that respondent-mother had persistent domestic violence-related problems, and that respondent-mother had failed to demonstrate the ability to employ appropriate parenting skills provide ample support for the trial court's conclusion that that there was a high likelihood that

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rights in Marco were subject to termination on the basis of neglect. Although the record in this case contains evidence tending to show that respondent-mother was both the victim and perpetrator of domestic violence, the trial court's neglect-related findings appropriately focused upon problematic conduct on the part of respondent-mother rather than upon the fact that respondent-mother was the victim of domestic violence.

the previous neglect that Marco had experienced would be repeated in the event that Marco was returned to respondent-mother's care. *See In re M.Y.P.*, 378 N.C. 667, 2021-NCSC-113, ¶¶ 19–20 (concluding that "the trial court properly determined that there was a high probability of a repetition of neglect" based, in part, upon the parent's failure to consistently visit with the child and to address issues of housing and substance abuse); *In re J.J.H.*, 376 N.C. 161, 185–86 (2020) (concluding that there was a likelihood of future neglect given that the parent's housing, although stable, was not appropriate for the children; that the parent "had missed at least twenty-two scheduled visits"; and that the parent had failed to interact appropriately with the children during visits).[6] As a result, since the trial court's properly supported findings demonstrate that respondent-mother's parental rights in Marco were subject to termination on the basis of neglect, N.C.G.S. § 7B-1111(a)(1), and since respondent-mother has not challenged the validity of the trial court's determination that the termination of respondent-mother's parental rights would be in Marco's best interests, N.C.G.S. § 7B-1110(a), the trial court's termination order is affirmed.

AFFIRMED.

6. As a result of the fact that "an adjudication of any single ground for terminating a parent's rights under N.C.G.S. § 7B-1111(a) will suffice to support a termination order," *In re M.S.*, ¶ 21, we need not address the validity of respondent-mother's challenge to the trial court's determination that her parental rights in Marco were subject to termination on the ground that she had willfully failed to make reasonable progress toward correcting the conditions that had led to Marco's removal from her home pursuant to N.C.G.S. § 7B-1111(a)(2).

KEITH v. HEALTH-PRO HOME CARE SERVS., INC.

[381 N.C. 442, 2022-NCSC-72]

THOMAS KEITH AND TERESA KEITH
v.
HEALTH-PRO HOME CARE SERVICES, INC.

No. 33A21

Filed 17 June 2022

1. Negligence—negligent hiring—elements—nexus between employment and injury—sufficiency of evidence

In an action brought against a home health agency based on a theory of negligent hiring after an aide the agency placed in plaintiffs' home orchestrated an off-duty home break-in and robbery of that home, the trial court properly denied the agency's motions for directed verdict and judgment notwithstanding the verdict because the evidence taken in the light most favorable to plaintiffs was sufficient on each element necessary to prove negligent hiring and to support a nexus between the aide's employment and the harm suffered by plaintiffs, which created a duty on the part of the agency. The harm to plaintiffs was foreseeable where the agency did not conduct a criminal background check on the aide, the aide provided false information on her job application, and the aide used information gained through her employment in plaintiffs' home to facilitate the robbery.

2. Negligence—negligent hiring—requested jury instruction—inclusion of elements not required

In an action brought against a home health agency based on a theory of negligent hiring after an aide the agency placed in plaintiffs' home orchestrated an off-duty home break-in and robbery of that home, the trial court properly denied the agency's request for the pattern jury instruction on negligent hiring, since it was not an accurate statement of the law in this case with regard either to the necessary elements of the claim or to the competency of the employee. To the extent the pattern instruction misstated the elements as set forth in case law, the Supreme Court recommended it be withdrawn and revised.

Chief Justice NEWBY concurring in part and dissenting in part.

Justice BERGER dissenting.

KEITH v. HEALTH-PRO HOME CARE SERVS., INC.

[381 N.C. 442, 2022-NCSC-72]

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 275 N.C. App. 43 (2020), reversing a judgment entered on 11 April 2018 by Judge Marvin K. Blount in Superior Court, Pitt County, and remanding for an order granting defendant's motion for judgment notwithstanding the verdict. Heard in the Supreme Court on 16 February 2022.

Ward and Smith, P.A., by Jeremy M. Wilson, Alex C. Dale, and Christopher S. Edwards, for plaintiff-appellants.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones, Michael S. Rothrock, and Linda Stephens, for defendant-appellee.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Heather Whitaker Goldstein, for the National Academy of Elder Law Attorneys and the North Carolina Chapter of the National Academy of Elder Law Attorneys, amici curiae.

Fox Rothschild LLP, by Troy D. Shelton, for the National Center for Victims of Crime, amicus curiae.

The Sumwalt Group, by Vernon Sumwalt, and White & Stradley, PLLC, by J. David Stradley, for the North Carolina Advocates for Justice, amicus curiae.

Parker Poe Adams & Bernstein LLP, by Jonathan E. Hall, Emily L. Poe, and Steven C. Wilson, for North Carolina Association of Defense Attorneys, North Carolina Retail Merchants Association and the Chamber Legal Institute, amici curiae.

BARRINGER, Justice.

¶ 1 In this matter, we must consider whether the Court of Appeals erred by reversing the judgment in favor of plaintiffs and remanding to the trial court for entry of an order granting defendant's motion for judgment notwithstanding the verdict and by determining that the trial court erred by denying defendant's requested instruction. After careful review of the record, we find that plaintiffs submitted sufficient evidence for each element of the claim.

¶ 2 Employers are in no way general insurers of acts committed by their employees, but as recognized by our precedent, an employer may owe a

duty of care to a victim of an employee's intentional tort when there is a nexus between the employment relationship and the injury. Here, when the evidence is viewed in the light most favorable to the plaintiffs, plaintiffs, who are an elderly infirm couple that contracted with a company to provide them a personal care aide in their home, have shown a nexus between their injury and the employment relationship. The employee was inadequately screened and supervised, being placed in a position of opportunity to commit crimes against vulnerable plaintiffs after her employer suspected her of stealing from plaintiffs. Therefore, we conclude that the Court of Appeals erred by reversing the judgment in favor of plaintiffs and by remanding for entry of a judgment notwithstanding the verdict in favor of defendant. Further, the Court of Appeals misinterpreted North Carolina precedent, and thus erred by holding the trial court erred by denying defendant's requested instructions.

I. Background

¶ 3 On 29 September 2016, plaintiffs Thomas and Teresa Keith (Mr. and Mrs. Keith), an elderly married couple with health and mobility issues, were the victims of a home invasion and armed robbery orchestrated by a personal care aide working for defendant Health-Pro Home Care Services, Inc. (Health-Pro). The aide, Deitra Clark, was assigned to assist the Keiths in their home. Clark subsequently pleaded guilty to first-degree burglary and second-degree kidnapping for her conduct.

¶ 4 In December 2016, the Keiths sued Health-Pro for negligence and punitive damages. The Keiths alleged that they hired Health-Pro as their in-home health care provider and "[d]espite Deitra Clark's criminal record, lack of a driver's license, and history of prior incidents [of suspected prior thefts from the Keiths' home], Health-Pro negligently allowed Deitra Clark to provide in-home care to the Keiths, and Health-Pro's conduct in assigning Deitra Clark to these responsibilities, as opposed to some other position in the company, was a proximate cause of the robbery of the Keiths and the consequent injuries sustained by them."

¶ 5 The case proceeded to trial and was tried before a jury at the 19 March 2018 session of superior court in Pitt County. At the conclusion of the Keiths' presentation of evidence, Health-Pro moved for directed verdict on the negligence claim pursuant to North Carolina Rule of Civil Procedure 50. Health-Pro argued that:

> As far as negligence, your Honor, we would contend there has been no evidence to meet the Plaintiffs' burden of proof. My understanding from the proposed jury instructions that the Plaintiffs have passed up

> is they treat this as an ordinary negligence case. The Defense contends this is negligence [sic] hiring retention and supervision case, which is part of our proposed instructions. That's very similar to what the Plaintiffs have pled. That type of case is what has essentially been argued to this jury and that's what the evidence has revealed. In order to succeed on that case . . . and even in an ordinary negligence case the Plaintiffs have to show that the events of September 29th, 2016, and Deitra Clarks' unfitness and participation in those events were foreseeable to my clients. Those are the events that have caused the Plaintiffs the only injury they complain of. And there is nothing in the record that suggests that it was foreseeable.

¶ 6 The trial court denied Health-Pro's motion for directed verdict at the close of the Keiths' evidence.

¶ 7 At the close of all evidence, Health-Pro renewed its motion for a directed verdict. The trial court denied the motion.

¶ 8 The trial court then held a charge conference for the jury instructions. As relevant to this appeal, the trial court proposed using for the negligence issue North Carolina Pattern Jury Instructions 102.10, 102.11, 102.19, and 102.50, which included an instruction on the general common law of negligence. Health-Pro objected to the foregoing Pattern Jury Instructions and instead requested Pattern Jury Instruction 640.42, entitled Employment Relationship - Liability of Employer for Negligence in Hiring, Supervision or Retention of an Employee. N.C.P.I.–Civil 640.42 (2009). Health-Pro's counsel contended that this is a negligent hiring case,[1] not an ordinary negligence case, and tendered its proposed instruction to the trial court in writing. The Keiths disagreed, arguing that their complaint pleaded an ordinary negligence claim and the facts in the case were beyond the Pattern Jury Instruction for negligent hiring. The trial court denied Health-Pro's requested jury instruction and instructed the jury in accordance with the trial court's proposed instruction.

¶ 9 After hearing the instructions from the trial court and deliberating, the jury returned a verdict in favor of the Keiths. The jury answered in the affirmative that both Mr. and Mrs. Keith were injured by the

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1. Like the Court of Appeals, we will use the shorthand "negligent hiring" to refer to the doctrine that includes negligent hiring, retention, and supervision for ease of reading. *See Keith v. Health-Pro Home Care Servs., Inc.*, 275 N.C. App. 43, 47 n.1 (2020). Similarly, we use the term "hiring" to refer to and include hiring, retention, and supervision.

negligence of Health-Pro. The jury found Mr. Keith entitled to recover $500,000 in damages from Heath-Pro for his personal injuries and found Mrs. Keith entitled to recover $250,000 in damages from Health-Pro for her personal injuries. The trial court then entered judgment to this effect on 11 April 2018.

¶ 10 Health-Pro subsequently moved for judgment notwithstanding the verdict under North Carolina Rule of Civil Procedure 50 and, in the alternative, for a new trial pursuant to North Carolina Rule of Civil Procedure 59. The trial court denied these post-trial motions on 3 May 2018. Health-Pro appealed the 11 April 2018 judgment and the 3 May 2018 order denying the post-trial motions.[2]

¶ 11 On appeal, a divided panel of the Court of Appeals reversed the judgment and remanded for entry of a judgment notwithstanding the verdict in Health-Pro's favor. *Keith v. Health-Pro Home Care Servs., Inc.*, 275 N.C. App. 43, 44 (2020).

¶ 12 To address Health-Pro's appeal of the trial court's denial of its motions for directed verdict and motion for judgment notwithstanding the verdict, the Court of Appeals determined that it "must first decide whether [the Keiths'] case was appropriately presented to the jury as an 'ordinary' negligence claim instead of an action for negligent hiring." *Id.* at 48–49. The Court of Appeals considered the allegations in the Keiths' complaint and the evidence presented at trial "within the context of precedent governing both ordinary negligence and negligent hiring." *Id.* at 51. The Court of Appeals ultimately indicated that it agreed with Health-Pro that the Keiths' "allegations and the facts of this case constituted a claim for negligent hiring," obligating the Keiths to prosecute their claim as one for negligent hiring. *Id.* at 61. The Court of Appeals explained as follows:

> *All* of Plaintiffs' relevant allegations and evidence directly challenge whether Defendant should have hired Ms. Clark as an in-home aide; whether Defendant acted appropriately in response to hearing from Plaintiffs that money had been taken from their home on two occasions—which would have involved either greater supervision of—such as moving Ms. Clark to a no-client-contact position, as suggested

2. The Keiths also appealed an issue to the Court of Appeals, but that issue has not been appealed to this Court. *Keith*, 275 N.C. App. at 44. Thus, we have omitted discussion of the Keiths' appeal.

> by Plaintiffs—or a decision regarding whether to retain her in Defendant's employ at all. Plaintiffs have cited no binding authority for the proposition that an action brought on allegations, and tried on facts, that clearly fall within the scope of a negligent hiring claim may avoid the heightened burden of proving all the elements of negligent hiring by simply designating the action as one in ordinary negligence, and we find none.

Id. at 64–65.

¶ 13 As such, the Court of Appeals held that the trial court erred by denying Health-Pro's motions for directed verdict and judgment notwithstanding the verdict "with respect to ordinary negligence, as that claim was not properly before the trial court, and no evidence could support it." *Id.* at 66. Given the Court of Appeals' conclusion that the Keiths' claim was not one of ordinary negligence, the Court of Appeals also held that it was error to deny Health-Pro's requested jury instruction on negligent hiring. *Id.* at 65.

¶ 14 The Court of Appeals then considered whether the Keiths' evidence was sufficient to survive a motion for judgment notwithstanding the verdict "based upon the theory of negligent hiring." *Id.* at 66. It began by discussing the Court of Appeals' case *Little v. Omega Meats I, Inc.*, 171 N.C. App. 583 (2005), which this Court affirmed per curiam without written opinion, 360 N.C. 164 (2005). *Keith*, 275 N.C. App. at 66–67.

¶ 15 The Court of Appeals concluded that according to *Little*, "three specific elements . . . must be proven [by a plaintiff] in order to show that an employer had a duty to protect a third party from its employee's negligent or intentional acts committed outside of the scope of the employment." *Id.* at 67. Specifically,

> (1) the employee and the plaintiff must have been in places where each had a right to be when the wrongful act occurred; (2) the plaintiff must have met the employee, when the wrongful act occurred, as a direct result of the employment; and (3) the employer must have received some benefit, even if only potential or indirect, from the meeting of the employee and the plaintiff that resulted in the plaintiff's injury.

Id. (cleaned up). The Court of Appeals held that there was no evidence to support any of the three elements in this case. *Id.* at 68.

¶ 16 Next, the Court of Appeals concluded that even if the requirements of *Little* are not applicable to this case, the trial court still erred by denying Health-Pro's motion for judgment notwithstanding the verdict based on a theory of negligent hiring. *Id.* at 69. Specifically, the Court of Appeals held that Health-Pro had no duty to protect the Keiths' from Clark's criminal acts on 29 September 2016, *id.* at 82, and the Keiths' "evidence was insufficient to demonstrate proximate cause," *id.* at 83.

¶ 17 The dissent disagreed with the majority's holding that the judgment in favor of the Keiths must be reversed and that Health-Pro was entitled to judgment as a matter of law. *Id.* at 84 (Dillon, J., dissenting). The dissent contended that although the Keiths alleged that Health-Pro was negligent in hiring Clark, the evidence of negligent hiring "is merely a means by which a plaintiff proves ordinary negligence." *Id.* "[N]egligent [hiring] (like any other ordinary negligence claim) requires a plaintiff to show that the defendant owed a duty, that the defendant breached that duty, and that the plaintiff suffered an injury proximately caused by the breach." *Id.*

¶ 18 Further, the dissent argued that when viewed in the light most favorable to the Keiths, the evidence was sufficient to make out an ordinary negligence claim based on their evidence of Health-Pro's negligent hiring of a dishonest employee. *Id.* Unlike the majority, the dissent concluded that the Keiths did not have to prove that the robbery occurred while Clark was on duty. *Id.* The evidence was sufficient for a negligence claim because when viewed in the light most favorable to the Keiths, Health-Pro's "dishonest employee use[d] 'intel' learned while on duty to facilitate a theft." *Id.*

¶ 19 The dissent asserted its view that the majority misread *Little*, *id.* at 87–88, and analyzed how the evidence when viewed in the light most favorable to the Keiths, as the non-moving party, is sufficient for each element, rendering denial of the motions for directed verdict and judgment notwithstanding the verdict proper, *id.* at 86–91.

¶ 20 Further, as to the jury instructions, the dissent stated:

> The trial court's actual instruction was a correct statement of the law in this case, as Plaintiffs claim was one in ordinary negligence. But it would not have necessarily been inappropriate for the trial court to expound on some of the elements, provided the requested instructions were a correct statement of the law as supported by the evidence. I disagree, though, that the instruction on duty requested by

> Defendant, though maybe appropriate in certain negligent [hiring] cases, would have been appropriate in this case. No one disputes that the "wrongful act" occurred when Ms. Clark had no right to be in Plaintiffs' home. However, as explained above, it was enough for Plaintiffs to show that Ms. Clark used intel learned while she was on the job to facilitate the robbery which occurred after she had left work for the day. Accordingly, the instructions requested by Defendant would have confused the jury. If followed by the jury, the instructions would have necessarily resulted in a verdict for Defendant. In fact, if the instructions were an accurate statement of the law, as applied to the evidence in this case, then Defendant would have been entitled to judgment as a matter of law. Based on the requested instructions, Defendant owed no duty to Plaintiffs *solely* because the robbery occurred when Ms. Clark was off the clock, and therefore could not be held liable, notwithstanding that Defendant had been negligent in continuing to place Ms. Clark in Plaintiffs' home, that Ms. Clark provided the intel learned while placed in Plaintiffs' home to the perpetrators to facilitate the break-in, that it was foreseeable that Ms. Clark would try and steal from Plaintiffs again, and that the break-in would not have otherwise occurred.

Id. at 92–93.

¶ 21 The dissent acknowledged that reasonable minds may reach different conclusions concerning Health-Pro's liability for the criminal conduct of Clark in this case, but that decision was for the jury, and the jury has spoken in this case in favor of liability. *Id.* at 93.

¶ 22 The Keiths appealed based on the dissent pursuant to N.C.G.S. § 7A-30(2).

II. Standard of Review

¶ 23 Pursuant to North Carolina Rule of Appellate Procedure 16, this Court "reviews the decision of the Court of Appeals to determine whether it contains any errors of law." *State v. Melton*, 371 N.C. 750, 756 (2018) (citing N.C. R. App. P. 16(a); *State v. Mumford*, 364 N.C. 394, 398 (2010)). The Court of Appeals' majority and dissent disagreed on whether the trial court erred by denying Health-Pro's motions for directed verdict

and judgment notwithstanding the verdict under North Carolina Rule of Civil Procedure 50 and by denying Health-Pro's requested jury instruction under North Carolina Rule of Civil Procedure 51. The Keiths appealed based on this disagreement. Therefore, we address each of these issues. *See* N.C. R. App. P. 16(a), (b).

III. Analysis

A. Health-Pro's Rule 50 Motions

¶ 24 **[1]** To address the issues before us, we must summarize the relevant aspects of the law of this State concerning negligence and negligent hiring. The common law claim of negligence has three elements: (1) a legal duty owed by the defendant to the plaintiff, (2) a breach of that legal duty, and (3) injury proximately caused by the breach. *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 328 (2006); *Kientz v. Carlton*, 245 N.C. 236, 240 (1957). Precedent decided by this Court further defines the contours of these three elements. For instance, this Court has recognized that "[n]o legal duty exists unless the injury to the plaintiff was foreseeable and avoidable through due care." *Stein*, 360 N.C. at 328.

¶ 25 Given this limitation, a defendant rarely has a legal duty to prevent the criminal acts of others. *Id.* However, "a defendant may be liable for the criminal acts of another when the defendant's relationship with the plaintiff or the third person justifies making the defendant answerable civilly for the harm to the plaintiff." *Id.* at 329. For example, this Court has recognized that a common carrier owes to its passengers a duty to provide for their safe conveyance and that, in the performance of its duty, it must protect a passenger from assault by the carrier's employees and intruders when by the exercise of due care, the acts of violence could have been foreseen and avoided. *See Smith v. Camel City Cab Co.*, 227 N.C. 572, 574 (1947). Similarly, a store owner owes to a customer on its premises during business hours for the purpose of transacting business thereon a duty to protect or warn the customer of endangerment from the criminal acts of third persons when reasonably foreseeable by the store owner and when such acts could have been prevented by the exercise of ordinary care by the store owner. *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 638–40 (1981).

¶ 26 In the context of employment, this Court held that a defendant employer owes its employees the duty to exercise reasonable care in its employment and retention of employees, and if there be negligence in this respect, which is shown to be proximate cause of the injury to the employee, the defendant employer may be liable for the injury caused by the negligence of the fellow employee, *Walters v. Durham Lumber Co.*,

163 N.C. 536, 541 (1913), or by the intentional torts of the employer's supervisors, *Lamb v. Littman*, 128 N.C. 361, 362–65 (1901). Later precedent recognized that an employer's duty to exercise reasonable care in its employment and retention of employees could extend to third persons. *See Braswell v. Braswell*, 330 N.C. 363, 373 (1991) (quoting *O'Connor v. Corbett Lumber Corp.*, 84 N.C. App. 178, 182–83 (1987)); *Medlin v. Bass*, 327 N.C. 587, 590 (1990).

¶ 27 In *Braswell* and *Medlin*, this Court expressly recognized that North Carolina courts have recognized a cause of action for negligent hiring. *Braswell*, 330 N.C. at 373; *Medlin*, 327 N.C. at 590. In *Medlin*, this Court delineated what a plaintiff must prove for this claim:

> (1) the specific negligent act on which the action is founded . . . (2) incompetency, by inherent unfitness or previous specific acts of negligence, from which incompetency may be inferred; and (3) either actual notice to the master of such unfitness or bad habits, or constructive notice, by showing that the master could have known the facts had he used ordinary care in 'oversight and supervision,' . . . and (4) that the injury complained of resulted from the incompetency proved.

327 N.C. at 591 (emphasis omitted) (quoting *Walters*, 163 N.C. at 541).

¶ 28 In *Little*, the Court of Appeals addressed whether there was sufficient evidence for a claim by third-person plaintiffs for negligent hiring against a defendant employer when the injury causing acts were intentional torts and criminal. 171 N.C. App. at 584–90. The Court of Appeals held that on the record before it, the defendant employer did not owe plaintiffs a duty of care and affirmed the trial court's granting of directed verdict in the defendant employer's favor. *Id.* at 589. The Court of Appeals explained:

> In the instant case Smith[, an independent contractor for defendant employer Omega,] was not in a place where he had a legal right to be since he broke in to plaintiffs' home; Smith and plaintiffs did not meet as a direct result of Smiths' relationship with defendants, since he did not enter plaintiffs' home as a salesman; finally, defendants received no benefit, direct, indirect or potential, from the tragic "meeting" between Smith and plaintiffs. We have found no authority in North Carolina suggesting that

> defendants owed plaintiffs a duty of care on these facts, and we hold that in fact none existed.
>
> We refuse to make employers insurers to the public at large by imposing a legal duty on employers for victims of their independent contractors' intentional torts that bear no relationship to the employment. We note that because this is a direct action against the employer, for the purposes of this appeal the result would be the same if Smith had been an employee of defendants instead of an independent contractor. Smith could have perpetrated the exact same crimes against these plaintiffs, in the exact same manner, and with identical chances of success, on a day that he was not selling Omega's meats and driving Omega's vehicle.

Id. at 588–89.

¶ 29 Prior to this analysis and holding, the Court of Appeals quoted three sentences from an article published in the Minnesota Law Review:

> Most jurisdictions accepting the theory of negligent hiring have stated that an employer's duty to select competent employees extends to any member of the general public who comes into contact with the employment situation. Thus, courts have found liability in cases where employers invite the general public onto the business premises, or require employees to visit residences or employment establishments. One commentator, in analyzing the requisite connection between plaintiffs and employment situations in negligent hiring cases, noted three common factors underlying most case law upholding a duty to third parties: (1) the employee and the plaintiff must have been in places where each had a right to be when the wrongful act occurred; (2) the plaintiff must have met the employee as a direct result of the employment; and (3) the employer must have received some benefit, even if only potential or indirect, from the meeting of the employee and the plaintiff.

Id. at 587–88 (quoting Cindy M. Haerle, *MINNESOTA DEVELOPMENTS: Employer Liability for the Criminal Acts of Employees Under Negligent Hiring Theory: Ponticas v. K.M.S. Investments*, 68 Minn.

L. Rev. 1303, 1308–09 (1984)). Citing this Article, the Court of Appeals in *Little* further stated, "[c]ourts in other jurisdictions have generally, though not exclusively, declined to hold employers liable for the acts of their independent contractors or employees under the doctrine of negligent hiring or retention when *any one* of these three factors was not proven." *Id.* at 588 (citing 68 Minn. L. Rev. 1303, 1308–09).

¶ 30 The dissent in *Little* contended that "our courts have already established a duty on the part of employers of independent contractors and that the majority opinion's conclusion that there is no duty in this case—as a matter of law—cannot be reconciled with this authority." *Id.* at 591–92 (Geer, J., dissenting). This Court affirmed per curiam the Court of Appeals' decision. *Little v. Omega Meats I, Inc.*, 360 N.C. 164, 164 (2005).

¶ 31 In the case before us, the Court of Appeals interpreted the aforementioned statements in *Little* as having "identified three specific elements that must be proven in order to show that an employer had a duty to protect a third party from its employee's negligent or intentional acts committed outside of the scope of the employment." *Keith*, 275 N.C. App. at 67. We hold that the Court of Appeals erred by reading *Little* as adopting such rigid requirements for reasons similar to those that the Court of Appeals' dissent in this case raised. *See id.* at 87 (Dillon, J., dissenting).

¶ 32 In *Little*, the Court of Appeals quoted a statement from a Minnesota Law Review article that "*[o]ne commentator* . . . noted three common *factors* underlying *most* case law upholding a duty to third parties" and cited this article for support that there is a *general*, but *not exclusive*, trend in other jurisdictions related to these factors. *Little*, 171 N.C. App. at 588 (emphasis added).[3] The Court of Appeals' analysis in *Little*

3. The Minnesota Law Review article cited as the "[o]ne commentator" a note by a Chicago-Kent Law Review staff member from 1977. Cindy M. Haerle, *MINNESOTA DEVELOPMENTS: Employer Liability for the Criminal Acts of Employees Under Negligent Hiring Theory: Ponticas v. K.M.S. Investments*, 68 Minn. L. Rev. 1303, 1308–09 (1984) (citing John C. North, Note, *The Responsibility of Employers for the Actions of Their Employees: The Negligent Hiring Theory of Liability*, 53 Chi-Kent L. Rev. 717, 724 (1977)). While published scholarship by law students and their attempts to deduce patterns in the holdings of various court rulings can be informative, such observations do not mean that other jurisdictions have adopted these three factors as requirements. On the same page as its description of the factors, the Minnesota Law Review article expressly recognized the lack of predictive relevance of one of these factors in determining when courts find an employer owes a duty of care to a particular plaintiff. *Id.* at 1309. The cases cited by *Little* in addition to the Minnesota Law Review article also do not identify or adopt a three-factor test. *Little v. Omega Meats I, Inc.*, 171 N.C. App. 583, 588 (2005) (citing *McLean v. Kirby Co.*,

implicitly reflected consideration of these factors, but the Court of Appeals indicated that its decision turned on the lack of "authority in North Carolina suggesting that defendants owed plaintiffs a duty of care *on these facts*." *Id.* (emphasis added).

¶ 33 The Court of Appeals did not state that it adopted these factors. It further did not even describe other jurisdictions as holding these factors to be elements. Nowhere in the *Little* decision did it state that these factors must be alleged, proven, or shown in courts of this State to establish an employer's duty to a third-party injured by an employee to exercise reasonable care in its hiring of employees. *Cf. Walters*, 163 N.C. at 541 (using the terms "it is shown" and "must be established" when addressing an employer's liability). Nor is it said that these factors are required. Rather, the Court of Appeals "refuse[d] to make employers insurers to the public at large by imposing a legal duty on employers for victims of their independent contractors' intentional torts that bear no relationship to the employment," and thus "required [for a duty to third parties for negligent hiring] a nexus between the employment relationship and the injury." *Little*, 171 N.C. App. at 588–89. The *Little* court considered these factors, in the absence of existing North Carolina law, in determining whether there is a sufficient nexus between the employment relationship and the injury, but it did not adopt a requirement that all three factors be proven.

¶ 34 Thus, the Court of Appeals in this case erred by reading *Little* to have "identified three specific elements that must be proven," and by declining "to hold employers liable for the acts of their employees under the doctrine of negligent hiring or retention when any one of these three factors was not proven." *Keith*, 275 N.C. App. at 67 (cleaned up).

¶ 35 The Court of Appeals further erred by holding that the trial court erred by denying Health-Pro's motions for directed verdict and judgment notwithstanding the verdict. *Id.* at 66. The Court of Appeals agreed with defendant that the Keiths' were obligated to prosecute their claim as one for negligent hiring because the Keiths' allegations and facts of this case constituted a claim for negligent hiring. *Id.* at 61. However,

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490 N.W.2d 229 (N.D. 1992); *Baugher v. A. Hattersley & Sons, Inc.*, 436 N.E.2d 126, 129 (Ind. Ct. App. 1982); *Parry v. Davidson-Paxon Co.*, 73 S.E.2d 59 (Ga. Ct. App. 1952); *Goforth v. Off. Max*, No. L97-2972, 1999 WL 33722384 (Va. Cir. Ct. Apr. 16, 1999)). Regardless, while we need not and do reach not this issue, we observe as set forth in more detail that in this case, there is evidence reflecting that the Keiths and Clark met through her employment as their personal care aide; the Keiths paid defendant for Clark's services; and at the time of the armed robbery, the Keiths were in their home, and Clark was in her car awaiting her accomplices.

this conclusion and the analysis supporting it failed to properly apply the standard of review for Rule 50 motions, the matter before the Court of Appeals.

¶ 36 The standard of review for Rule 50 motions is well-established. Motions for directed verdict and judgment notwithstanding verdict are questions of law that appellate courts review de novo. *Desmond v. News & Observer Publ'g Co.*, 375 N.C. 21, 41 (2020). On appeal, the standard of review for both motions is the same: "whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322–23 (1991). "In determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the evidence which supports the non-movant's claim must be taken as true and considered in the light most favorable to the non-movant, giving the non-movant the benefit of every reasonable inference which may legitimately be drawn therefrom and resolving contradictions, conflicts, and inconsistencies in the non-movant's favor." *Turner v. Duke Univ.*, 325 N.C. 152, 158 (1989). "If, after undertaking such an analysis of the evidence, the [court] finds that there is evidence to support each element of the nonmoving party's cause of action, then the motion for directed verdict and any subsequent motion for judgment notwithstanding the verdict should be denied." *Abels v. Renfro Corp.*, 335 N.C. 209, 215 (1993).

¶ 37 Even when addressing an argument by Health-Pro that the negligence claim in this case is in fact a negligent hiring claim, a Rule 50 motion turns on the sufficiency of the evidence at the trial. Thus, we analyze the evidence at trial to assess whether there is support for each element of the nonmoving party's cause of action.[4]

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4. In addition to analyzing the evidence at trial, the Court of Appeals analyzed the pleadings and justified its review and analysis of the pleadings on *Burton v. Dixon*, 259 N.C. 473 (1963) and *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48 (2016). *Keith*, 275 N.C. App. at 51–54. *Burton* and *CommScope* addressed objections to the sufficiency of a pleading to state a claim. *CommScope*, 369 N.C. at 51; *Burton*, 259 N.C. at 476–77. This matter reaches us well past that stage. Thus, these cases do not inform our analysis. We are reviewing motions for directed verdict and judgment notwithstanding the verdict, which are made during and after a trial. Further, Health-Pro did not object to any of the evidence as outside the scope of the pleadings. Pursuant to North Carolina Rule of Civil Procedure 15(b), "[w]hen issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." N.C.G.S. § 1A-1, Rule 15(b) (2021). Thus, even if evidence addressed issues beyond the scope of the pleadings, we must treat them as if raised in the pleadings pursuant to Rule 15(b) on account of the Keiths' and Health-Pro's implied consent. Therefore, we need not concern ourselves with the pleadings, and, instead, consistent with the standard of review for the matter before us, we concern ourselves with the evidence at trial.

¶ 38 The evidence at trial tended to show the following when viewed in the light most favorable to the nonmoving party, the Keiths. The Keiths were an elderly couple with serious health issues and limited mobility. Mr. Keith had just undergone heart surgery when they sought an at-home-care provider. The Keiths and their son, Fred Keith (Fred), met with Health-Pro's sole owner, Chief Executive Officer, and President, Sylvester Bailey III (Mr. Bailey). Health-Pro provided at-home personal and health care. During that meeting, Health-Pro, through Mr. Bailey, informed them that all employees undergo criminal background checks. After the meeting, the Keiths hired Health-Pro for their services in December 2012.

¶ 39 In 2015, Health-Pro received an employment application from Clark and permission to conduct a criminal background check. Pursuant to State law, "[a]n offer of employment by a home care agency licensed under [Chapter 131E on Health Care Facilities and Services] to an applicant to fill a position that requires entering the patient's home is conditioned on consent to a criminal history record check of the applicant." N.C.G.S. § 131E-265(a) (2021).

¶ 40 Health-Pro's criminal background investigation policy was that "[a]ll employees of Health-Pro must undergo a criminal background check by the State Bureau of Investigation or other approved entity" and "[i]f the criminal history involves a felony not listed above, a misdemeanor, a series of arrests, or a criminal conviction greater than seven years, the agency will review the offense, its relevance to the particular job performance, and to the length of time between conviction and the employment date." Further, "[a] decision regarding employment will be reached only after the nature, severity and date of the offense have been carefully evaluated."

¶ 41 Similarly, under State law,

> [w]ithin five business days of making [a] conditional offer of employment, a . . . home care agency shall submit a request to the Department of Public Safety under [N.C.]G.S. [§] 143B-939 to conduct a State or national criminal history record check required by [N.C.G.S. § 131E-265], or shall submit a request to a private entity to conduct a State criminal history record check required by [N.C.G.S. § 131E-265].

N.C.G.S. § 131E-265(a). "If an applicant's criminal history record check reveals one or more convictions of a relevant offense, the . . . home care agency . . . shall consider [the enumerated] factors [in this section] in

determining whether to hire the applicant[.]" N.C.G.S. § 131E-265(b). Relevant offense is defined as "a county, state, or federal criminal history of conviction or pending indictment of a crime, whether a misdemeanor or felony, that bears upon an individual's fitness to have responsibility for the safety and well-being of aged or disabled persons." N.C.G.S. § 131D-40(d) (2021); *see* N.C.G.S. § 131E-265(d) ("As used in this section, the term 'relevant offense' has the same meaning as in [N.C.]G.S. [§] 131D-40."). "An entity and officers and employees of an entity shall be immune from civil liability for failure to check an employee's history of criminal offenses if the employee's criminal history record check is requested and received in compliance with [N.C.G.S. § 131E-266.]" N.C.G.S. § 131E-265(g).

¶ 42 Health-Pro admitted that it did not run a criminal background check with the State Bureau of Investigation or other approved entity and admitted that the review and evaluation required by the policy was not completed. However, Health-Pro contended it ran a criminal background check and was aware of Clark's misdemeanor convictions and other charges. To the contrary, the only document in Health-Pro's employment file relating to a criminal background check was one page and only showed the following:[5]

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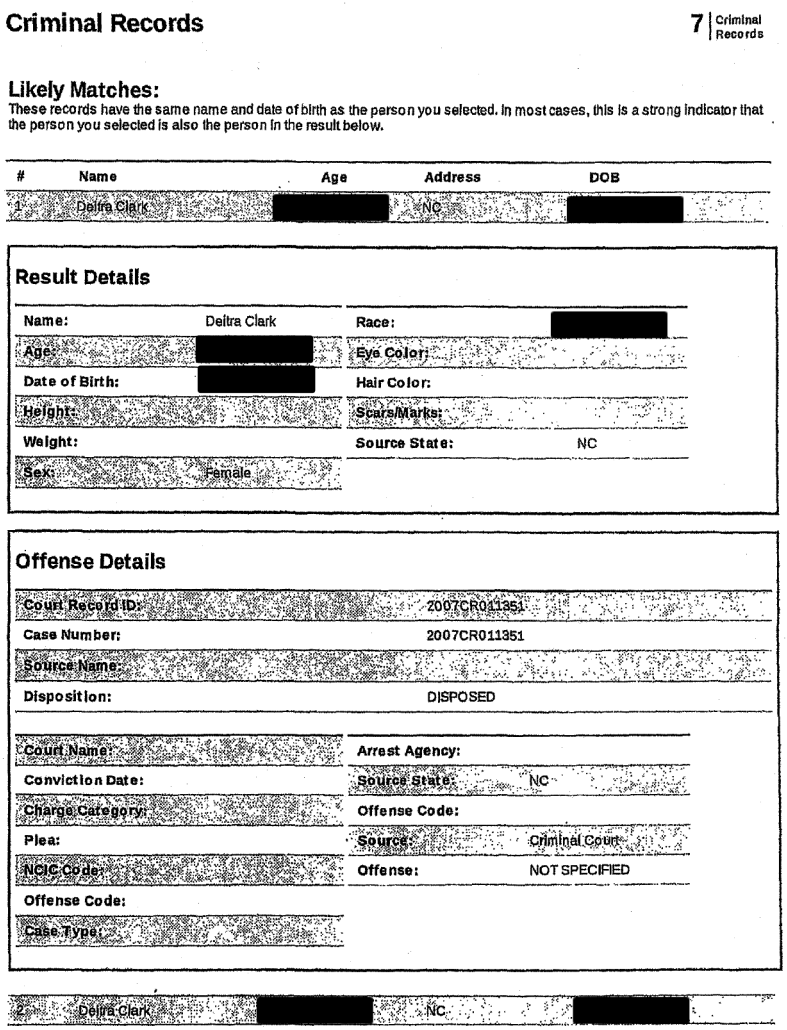
5. This document has been redacted for purposes of this opinion to remove irrelevant personal information.



Criminal Records

7 | Criminal Records

Likely Matches:

These records have the same name and date of birth as the person you selected. In most cases, this is a strong indicator that the person you selected is also the person in the result below.

#	Name	Age	Address	DOB
1	Deitra Clark	[redacted]	NC	[redacted]

Result Details

Name:	Deitra Clark	Race:	[redacted]
Age:	[redacted]	Eye Color:	
Date of Birth:	[redacted]	Hair Color:	
Height:		Scars/Marks:	
Weight:		Source State:	NC
Sex:	Female		

Offense Details

Court Record ID:	2007CR011351		
Case Number:	2007CR011351		
Source Name:			
Disposition:	DISPOSED		
Court Name:		Arrest Agency:	
Conviction Date:		Source State:	NC
Charge Category:		Offense Code:	
Plea:		Source:	Criminal Court
NCIC Code:		Offense:	NOT SPECIFIED
Offense Code:			
Case Type:			

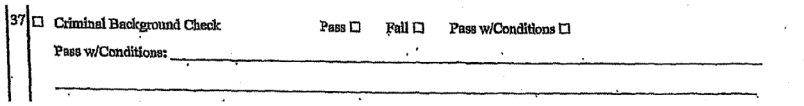
2	Deitra Clark	[redacted]	NC	[redacted]

Additionally, the company, from which Health-Pro contended it ran a criminal background check, stated on its website that its services cannot be used to conduct background checks for employees or applicants.

¶ 43 Mr. Bailey offered conflicting testimony at trial concerning why Health-Pro's employment file for Clark only contained this one page, first stating that Health-Pro culled down the file every year because some reports were fifteen pages and then later saying Health-Pro just prints one

page of a criminal background report for the file. Notably, Mr. Bailey also testified at his deposition that he conducted the criminal background check but did not have a specific memory of running the check or seeing the charges and convictions. Yet, he subsequently changed his testimony when deposed as the Rule 30(b)(6) representative of Health-Pro and when he testified at trial.

¶ 44 Health-Pro's criminal background investigation policy also dictated that the criminal history record information received from the criminal background check be stored in a separate locked file in the Human Resource Department, but this was not done. Additionally, the Interviewing and Hiring Process form used by Health-Pro for hiring Clark did not have checks next to the boxes for a criminal background check as reflected below:


37 ☐ Criminal Background Check Pass ☐ Fail ☐ Pass w/Conditions ☐
Pass w/Conditions: _____

¶ 45 Thus, viewed in the light most favorable to the Keiths, Health-Pro did not run a criminal background check of Clark upon hiring her as a personal care aide in September 2015. It did not check to confirm that she had a driver's license as indicated on her application. Health-Pro simply interviewed Clark after receiving her application and then hired her. Nevertheless, Health-Pro represented on its website that it carefully screened caregivers by calling previous employers and performing criminal background checks.

¶ 46 As of the date of her hiring, a criminal background check of Clark would have revealed the following: 2007 charge for no operator's license; 2008 found guilty of driving while license revoked; 2009 charge for possession of marijuana; 2009 found guilty of possession of drug paraphernalia; 2010 charge for possession of drug paraphernalia; 2010 charge for communicating threats (dismissed because of noncooperating witness); 2010 found guilty of criminal contempt; and 2011 charge for communicating threats (dismissed because of noncooperating witness). Further, at that time, Clark did not have a valid driver's license.

¶ 47 Clark, however, indicated on her employment application that she had never been convicted of or entered a plea of guilty in a court of law. Thus, as conceded by Health-Pro, Clark lied on her job application about her criminal background. Health-Pro acknowledged that this dishonesty would be concerning to Health-Pro if caught. Clark also identified that

she had a driver's license on her application, but she did not have a driver's license at the time of her application, just an identification card.

¶ 48 A few months later in November or December, Health-Pro assigned Clark to work for the Keiths as a personal care aide at their home. The Keiths understood that Health-Pro ran background checks on all their aides, including Clark, and would provide aides that would do a good job and not pose a danger.

¶ 49 Clark was one of the primary aides working for the Keiths. She helped in the home by cleaning the house, doing laundry, and driving Mrs. Keith for errands. Clark had access to the whole house and could move around the house freely. Through her employment, Clark learned about the Keiths, their valuables, their schedules, their collection of rolled coins, and their spare key.

¶ 50 On or about 25 May 2016, Health-Pro received a letter from Pitt County Child Support Enforcement indicating that a claim against Clark for nonpayment of child support was being pursued.

¶ 51 In 2016, after Clark had been assigned to the Keiths' home, the Keiths' granddaughter and daughter discovered that about $900 of rolled coins were missing. Additionally, $1,260 in cash went missing from Mrs. Keith's dresser. Before the cash went missing, an aide had seen Mrs. Keith remove money from her dresser drawer. Mrs. Keith thought the aide was Clark but was not positive, so she did not accuse her when the cash went missing. Cash also went missing from Mr. Keith's wallet on two occasions.

¶ 52 The Keiths informed Health-Pro about the missing money, and Mr. Bailey on behalf of Health-Pro came to the Keiths' home to discuss in July 2016. The missing money was not located at the meeting (nor was it ever found), but Health-Pro said it would investigate everything and removed Clark and the other aide assigned at the time from servicing the Keiths' home. Health-Pro also agreed to pay back the missing money to the Keiths.

¶ 53 Health-Pro determined that Clark and one other aide were the only aides in the home on the days that money went missing and spoke to them. Yet, Health-Pro did nothing further; it did not run a criminal background check or report the incident to the police.

¶ 54 Fred, the Keiths' son, also met with Mr. Bailey after he learned about the missing money. Mr. Bailey informed Fred that it was either Clark or the other aide but that he had a strong belief that Clark was the one involved. Mr. Bailey assured Fred that neither one of them would be back in his parents' home, and Fred made clear that he did not want Clark back in his parents' home.

¶ 55 Nevertheless, a few weeks later, Health-Pro assigned Clark back to the Keiths' home. Although Health-Pro contended that Fred asked for Clark to return to the home because Clark gave Mrs. Keith better baths than other aides, Fred testified that he disputed Health-Pro's contention, and the Keiths testified that they did not ask for Clark to be reassigned to their home. The Keiths assumed that Health-Pro, after completing its investigation, thought Clark did not pose a threat to the Keiths. Health-Pro also admitted that it did not inform Fred that they were sending Clark back to the home. Thus, viewing the evidence in the light most favorable to the Keiths, Health-Pro made the unilateral decision to reassign Clark as a personal care aide to the Keiths' home after the thefts.

¶ 56 On 9 September 2016, Health-Pro received another letter from Pitt County Child Support Enforcement.

¶ 57 A few weeks later on 28 September 2016, Clark used the information that she gleaned about the Keiths' home, the comings and goings of Health-Pro aides and the Keiths' family, and their valuables to accomplish a home invasion and robbery. Clark informed her accomplices about everything, including the location of the spare hidden key. Clark also knew and shared with her accomplices that the Health-Pro aide assigned to work that evening, Erica, would leave when her shift ended at 11:00 p.m. and no other family was visiting and staying with the Keiths that evening.

¶ 58 The assigned aide, Erica, did in fact leave in accordance with her shift schedule at 11:00 p.m. on the evening of 28 September 2016. Shortly thereafter, Clark drove her two accomplices in her car to the Keiths' house and dropped them off to complete the home invasion and robbery. Her accomplices dressed in dark clothing and wore masks. Between 11:30 p.m. and 12:00 a.m., the accomplices used the spare hidden key to enter the house and walked into the den where Mr. Keith was watching a movie. Mrs. Keith was in bed. The accomplices disconnected the telephone.

¶ 59 As testified by Mr. Keith, the accomplices knew exactly where to go in the house; they knew where everything was.

¶ 60 One accomplice had a gun and pointed the gun at Mr. Keith and ordered Mr. Keith to lay on the floor face down. The other accomplice walked into the bedroom where Mrs. Keith was lying in bed and took from the bed stand the .32 caliber Harrison and Richardson pistol belonging to Mr. Keith. The originally armed accomplice found Mr. Keith's ATM card in one of his desk drawers and started waiving it around like it was something for which he was searching. Additionally, while in the

home, the other accomplice stole the Keiths' two boxes of rolled coins, totaling $500. The Keiths had stored the boxes in a black bag under Mr. Keith's work desk in the den of their home. One of the accomplices also told Mrs. Keith that she should be sure to mention the name of Erica.

¶ 61 The originally armed accomplice forced Mr. Keith at gunpoint to drive him to an ATM. During the drive to the ATM, the accomplice asked Mr. Keith if he had a worker that comes over to the home named Erica. After Mr. Keith answered affirmatively, the accomplice told Mr. Keith that he needed to fire Erica because she left the door open. Arriving at the ATM around 12:30 a.m., the accomplice forced Mr. Keith to withdraw a thousand dollars. The accomplice then ordered Mr. Keith to drive him to an elementary school, where the accomplice got out of the car and ran away.

¶ 62 Clark picked up both accomplices along with the stolen cash, coins, and gun. Thereafter, she and the accomplices took her car to Walmart to convert the stolen coins into cash by using a Coinstar machine at around 1:00 a.m.

¶ 63 Health-Pro terminated Clark after it identified her in the video footage from the police showing the conversion of the coins to cash at the Coinstar machine.Only after the home invasion and robbery and after firing Clark did Health-Pro run a criminal background check on Clark.

¶ 64 After undertaking an analysis of the evidence and considering it in the light most favorable to the Keiths, we find that there is evidence to support each element of the Keiths' cause of action and that the motion for directed verdict and subsequent motion for judgment notwithstanding the verdict should be denied. *See Abels v. Renfro Corp.*, 335 N.C. at 215.

¶ 65 Here, the Keiths pursued a negligence claim against the employer of the intentional tortfeasor, Health-Pro, premised on Health-Pro's own negligence in hiring, retaining, and/or assigning Clark, the intentional tortfeasor, to work as a personal care aide at their home. Given that the Keiths' claim relied on negligence by the employer in hiring, retaining, and/or assigning an employee, our precedent recognizes this claim under the theory of liability known as negligent hiring, or more commonly framed as a claim for negligent hiring. While the elements of negligence are a legal duty, breach, and injury proximately caused by the breach, appellate precedent further defines the contours of these elements in specific contexts as previously discussed. Thus, when a plaintiff alleges an employer negligently hired, retained, or supervised an employee, and seeks recovery from the employer for injury caused by the employee, the

Medlin elements for negligent hiring and the *Little* nexus requirement for duty must be satisfied to show a negligence claim in this context.

¶ 66 Therefore, to survive a motion for directed verdict or judgment notwithstanding the verdict for their negligence claim, the Keiths had to present evidence to support each element set forth in *Medlin* and to support a nexus between the employment and the injury as required by *Little*.[6] The evidence when viewed in the light most favorable to the Keiths, as summarized previously, satisfied the elements in *Medlin* and the nexus requirement in *Little*. In addition to evidence supporting each of the elements, there is enough distinguishing this case from *Little* and enough similarity with *Lamb* to preclude our precedent from foreclosing the claim as a matter of law.

¶ 67 Unlike *Little*, the evidence viewed in the light most favorable to plaintiffs suggests a sufficient nexus between the injurious act and employment relationship to create a duty. The plaintiffs in this case were daily customers of the defendant employer and had been for years. The defendant employer assigned the intentional tortfeasor employee to work for the plaintiffs inside plaintiffs' home. Thus, defendant employer participated in the meeting between the intentional tortfeasor employee and the plaintiffs and gained financially from their continued meeting. When viewed in the light most favorable to the Keiths, the intentional tortfeasor employee also injured the plaintiff customer, the Keiths, by disclosing and using the intel she gained through her employment to orchestrate a robbery at the intentional tortfeasor employee's place of employment, the Keiths' home.

¶ 68 When the evidence is viewed in the light most favorable to the Keiths, the intentional tortfeasor employee was skilled at her work but incompetent to work for vulnerable customers in the customers' home without supervision by another, rendering this case similar to *Lamb*. *See Lamb*, 128 N.C. at 363. In *Lamb*, the defendant's supervisor had command over the department in which plaintiff, a ten-year-old boy, worked as floor sweeper. *Id.* at 362. The supervisor shoved plaintiff causing him injury, and plaintiff sued the supervisor's employer. *Id.* at 361–62, 365. While there was no evidence of the unskillfulness of the supervisor, he had treated the plaintiff poorly the day before the injury and had a general reputation for his cruelty and temper. *Id.* at 362. This Court concluded that "the evidence shows that he was unfit and incompetent to

6. Since we conclude that the Keiths' claim is one of negligent hiring pursuant to our precedent, in this particular case liability under a negligence theory is not available, and, thus, we do not address its application.

perform the duties of supervising children and the help under him by reason of his cruel nature and high temper." *Id.* at 363. Given the foregoing, this Court found that the trial court erred by not submitting the case to the jury and reversed the motion dismissing the case for nonsuit. *Id.* at 361–62.

¶ 69 In this case, evidence concerning the falsities in Clark's employment application, Health-Pro's belief that she committed the prior thefts, and the particulars of her criminal background support the inference that Health-Pro knew or should have known of Clark's incompetence for her assignment to the Keiths' home. *See id.* at 362. Health-Pro's personal care aides served elderly and vulnerable adults and by the nature of their work gained information about their clients' daily routine, personality, finances, and home and were not supervised while in the home. The Keiths, in fact, retained Health-Pro because Mr. Keith needed an at-home-care provider after his heart surgery and throughout their engagement of Health-Pro's services were elderly and with serious health issues and limited mobility.

¶ 70 In addition to the foregoing, evidence also supports the foreseeability of the injury to the Keiths from such incompetence. "Proximate cause is a cause which in natural and continuous sequence produces a plaintiff's injuries and one from which a person of ordinary prudence could have reasonably foreseen that such a result or some similar injurious result was probable." *Murphey v. Ga. Pac. Corp.*, 331 N.C. 702, 706 (1992). "It is not necessary that a defendant anticipate the particular consequences which ultimately result from his negligence. It is required only that a person of ordinary prudence could have reasonably foreseen that such a result, *or some similar injurious result*, was probable under the facts as they existed." *Sutton v. Duke*, 277 N.C. 94, 107 (1970) (cleaned up).

¶ 71 In this matter, Health-Pro acknowledged that it must discipline employees when Health-Pro knows the employee did something out of compliance because absent discipline, there is a risk that the conduct would get worse. Health-Pro also knew or should have known that Clark was under financial strain on account of the child support enforcement letters and that Clark may retaliate against the Keiths for disclosing the prior thefts given particulars in her criminal background, including charges of communicating threats and a conviction for criminal contempt. Health-Pro further knew or should have known that Clark committed prior thefts in the Keiths' home. Additionally, because of their age, medical conditions, and limited mobility, the Keiths were vulnerable to adverse conduct against them in their home by an incompetent

Health-Pro employee. Thus, when viewed in the light most favorable to the Keiths, a person of ordinary prudence could have reasonably foreseen that as a result of Health-Pro's negligent hiring, the home invasion and robbery of the Keiths' home or some similar injurious result was probable and that the trauma from such event would injure the Keiths.

¶ 72 Thus, in this case, the jury, not the court, must decide the outcome of the Keiths' claim. The Court of Appeals in this matter erred by not considering the evidence in the light most favorable to the Keiths, just as Health-Pro's arguments urge us to do. Health-Pro contends that Clark's actions bore no relationship to her employment and no action or inaction by Health-Pro proximately caused the Keiths' injuries because "[a]ny information Clark learned about [the Keith]s' home on the job could have been ascertained just as easily by others watching the home from the street." The jury could have agreed with Health-Pro and weighed the evidence in its favor but given the testimony and evidence before the trial court supporting a contrary interpretation of the facts, this argument cannot justify judgment in Health-Pro's favor as a matter of law. We must view all of the evidence which supports the Keith's claim as true and consider the evidence in the light most favorable to the Keiths, giving them the benefit of every reasonable inference that may legitimately be drawn therefrom and resolving contradictions, conflicts, and inconsistencies in their favor. *Turner*, 325 N.C. at 158. Therefore, we conclude that the Court of Appeals erred by reversing the trial court and remanding for entry of judgment in favor of Health-Pro.

B. Jury Instructions

¶ 73 **[2]** "In evaluating the validity of a party's challenge to the trial court's failure to deliver a particular jury instruction, 'we consider whether the instruction requested is correct as a statement of law and, if so, whether the requested instruction is supported by the evidence.' " *Chisum v. Campagna*, 376 N.C. 680, 2021-NCSC-7, ¶ 52 (quoting *Minor v. Minor*, 366 N.C. 526, 531 (2013)). When the requested jury instruction does not accurately state the applicable law, even if from a North Carolina Pattern Jury Instruction, the trial court does not err by failing to the instruct the jury as requested. *Id.* ¶ 54.

¶ 74 In this matter, the trial court proposed using the North Carolina Pattern Jury Instructions on negligence, specifically 102.10, 102.11, 102.19, and 102.50. Health-Pro counsel objected and requested instead Pattern Jury Instruction 640.42. The requested instruction, however, does not accurately state the applicable law.

¶ 75 First, as previously discussed, this Court has not adopted the factors discussed in *Little* as elements necessary to prove a claim for negligent hiring. Thus, the requested instruction as reproduced below is an inaccurate statement of the law.

> First, the plaintiff must prove that the defendant owed the plaintiff a legal duty of care. This means that the plaintiff *must* prove that Deitra Clark and the plaintiff were in places where each had a right to be when the wrongful act occurred, that the plaintiff encountered Deitra Clark as a direct result of her employment by the defendant, and that the defendant *must* reasonably have expected to receive some benefit, even if only potential or indirect, from the encounter between Deitra Clark and the plaintiff.

(emphasis added).

¶ 76 While the *Little* factors are relevant in assessing whether an employer has a legal duty to a third party for its employee's intentional torts as exemplified by the analysis conducted in *Little* and in this opinion, *Little* did not hold that they "must" be proven by the plaintiff. *Little*, 171 N.C. App. at 588–89.

¶ 77 Second, the instruction concerning the employee's incompetence is not an accurate statement of the law in this case. The Keiths have not contended, nor does the evidence support, that Clark lacked the physical capacity, natural mental gifts, skill, training, or experience needed for her job or that Clark previously committed acts of carelessness or negligence. As recognized in *Lamb*, incompetence and unfitness for employment is *not* so limited; incompetence and unfitness can exist on account of the employee's disposition, such as the cruel nature and high temper of the supervisor of children as in *Lamb*. 128 N.C. at 363; *see also Walters*, 163 N.C. at 542 ("[I]t may be well to note that this term, incompetency, is not confined to a lack of physical capacity or natural mental gifts or of technical training when such training is required, but it extends to any kind of unfitness which renders the employment or retention of the servant dangerous to his fellow-servant[.]" (cleaned up)).

¶ 78 In this case, the incompetence alleged and supported by the evidence when viewed in the light most favorable to the Keiths is Clark's dishonesty and propensity to steal and break the law. Thus, the requested instruction as reproduced below would not have been proper in this case.

> Second, the plaintiff must prove that Deitra Clark was incompetent. This means that Deitra Clark was not fit for the work in which she was engaged. Incompetence may be shown by inherent unfitness, such as the lack of physical capacity or natural mental gifts, or the absence of skill, training or experience.
>
> Incompetence may also be inferred from previous specific acts of careless or negligent conduct by Deitra Clark, or from prior habits of carelessness or inattention on the part of Health-Pro Home Care Services, Inc. in any kind of work where careless or inattentive conduct is likely to result in injury. However, evidence, if any, tending to show that Deitra Clark may have been careless or negligent in the past may not be considered by you in any way on the question of whether Deitra Clark was negligent on the occasion in question, but may only be considered in your determination of whether Deitra Clark[ ]was incompetent, and whether such incompetence was known or should have been known to the defendant.

¶ 79 Because Health-Pro's requested instruction was not an accurate statement of the law, we agree with the dissent in the Court of Appeals that it would have been inappropriate in this case and that the trial court did not err by denying the request. However, as we have concluded that the Keiths' claim was a claim for negligence dependent on a theory of negligent hiring, requiring satisfaction of the *Medlin* elements and *Little* nexus requirement, we do not endorse the use of the generic common law negligence instruction in a case substantially similar to this matter. This Court has refused and continues to "refuse to make employers insurers to the public at large by imposing a legal duty on employers for victims of their [employee]s' intentional torts that bear no relationship to the employment," *Little*, 171 N.C. App. at 588–89, *aff'd per curiam*, 360 N.C. 164 (2005), and the generic common law negligence instructions fail to account for our holdings to this effect.

¶ 80 Where our precedent requires an element to support a claim or theory, the jury should be instructed to this effect. *Cf. Calhoun v. State Highway & Pub. Works Comm'n*, 208 N.C. 424, 426 (1935) ("The rule of practice is well established in this jurisdiction that when a request is made for a specific instruction, correct in itself and supported by evidence, the trial court, while not obliged to adopt the precise language

of the prayer, is nevertheless required to give the instruction, in substance at least[.]"). Nevertheless, under current law, an argument concerning an error in the jury instructions must be preserved for review by this Court by tendering a requested instruction that is an accurate statement of the law and that is supported by the evidence. *See Chisum*, 2021-NCSC-7, ¶ 52. Since we conclude that the trial court did not err in denying Health-Pro's requested jury instructions because the requested jury instruction was not an accurate statement of the law, we reverse the Court of Appeals' holding to the contrary.[7]

IV. Conclusion

¶ 81 We agree with the Court of Appeals that plaintiffs' negligence claim was dependent on a theory of negligent hiring, which is commonly plead as a negligent hiring claim. However, the evidence, taken in the light most favorable to plaintiffs, was sufficient as a matter of law to be presented to the jury. There was evidence to support each element of the claim, the *Medlin* elements, and the *Little* nexus requirement. Therefore, the Court of Appeals erred by reversing the judgment in favor of plaintiffs and by remanding to the trial court for entry of an order granting defendant's motion for judgment notwithstanding the verdict. Further, the Court of Appeals misinterpreted precedent from *Little*, and under a proper reading of that case and other precedent, the jury instruction requested by defendant was not an accurate statement of the law. Therefore, the Court of Appeals also erred by holding that the trial court erred by denying defendant's requested instruction. Accordingly, we reverse the Court of Appeals' decision.

REVERSED.

Chief Justice NEWBY concurring in part and dissenting in part.

¶ 82 I agree with the majority that plaintiffs' claim was one for negligent hiring and that to prove a claim for negligent hiring, a plaintiff must "present evidence to support each element set forth in *Medlin* [*v. Bass*, 327 N.C. 587, 398 S.E.2d 460 (1990)] and to support a nexus between the employment and the injury as required by *Little* [*v. Omega Meats I, Inc.*, 171 N.C. App. 583, 615 S.E.2d 45 (2005)]." The majority also properly holds that in the light most favorable to the

7. Given our holding, it is recommended that the North Carolina Pattern Jury Instruction Committee promptly withdraw N.C.P.I.–Civil 640.42 (2009) and revise it consistent with this opinion.

plaintiffs, the evidence was sufficient to submit the case to the jury on a negligent hiring theory. Moreover, the majority correctly concludes that N.C. Pattern Jury Instruction 640.42 wrongly uses the *Little* factors to define the required legal duty and improperly focuses on an employee's "incompetence" as opposed to the employee's "unfitness." Finally, I agree that when a plaintiff presents a negligent hiring claim, a trial court errs by instructing the jury on ordinary negligence instead of negligent hiring. I write separately, however, because I would hold that the trial court's failure to give a negligent hiring instruction prejudiced defendant such that defendant is entitled to a new trial. Accordingly, I concur in part and dissent in part.

¶ 83 "According to well-established North Carolina law, a party's decision to request the delivery of a particular instruction during the jury instruction conference suffices to preserve a challenge to the trial court's refusal to deliver that instruction to the jury." *State v. Benner*, 380 N.C. 621, 2022-NCSC-28, ¶ 32; *see also* N.C. R. App. P. 10(a)(2) (2021) ("A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection."). "It is the duty of the court to charge the law applicable to the substantive features of the case arising on the evidence without special request and to apply the law to the various factual situations presented by the conflicting evidence." *Griffin v. Watkins*, 269 N.C. 650, 653, 153 S.E.2d 356, 359 (1967) (quoting 4 Strong's N.C. Index: *Trial*, § 33, at 331 (1961)). "A charge which fails to submit one of the material aspects of the case presented by the allegation and proof is prejudicial." *W. Conf. of Original Free Will Baptists of N.C. v. Miles*, 259 N.C. 1, 13, 129 S.E.2d 600, 607 (1963) (quoting 4 Strong's N.C. Index: *Trial*, § 33, at 331–32 (1961)).

¶ 84 To show ordinary negligence, a plaintiff must show "(1) a legal duty; (2) a breach thereof; and (3) injury proximately caused by the breach." *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 328, 626 S.E.2d 263, 267 (2006). The tort of negligent hiring, which this Court has recognized for over a century, focuses on whether an employee was unfit for the work the employee was hired to perform. *See Lamb v. Littman*, 128 N.C. 361, 362, 38 S.E. 911, 911 (1901). In *Lamb*, we considered whether an owner of a mill could be liable under a theory of negligent hiring when a supervisor assaulted a ten-year-old employee. *Id.* We noted that "the evidence show[ed] that [the supervisor] was unfit and incompetent to perform the duties of supervising children and the help under him by

reason of his cruel nature and high temper," *id.* at 363, 38 S.E. at 912, and that this unfitness "ought to have been known to defendant," *id.* at 362, 38 S.E. at 911. We further stated that

> [w]e do not wish to be understood as holding that the [employer] is generally an insurer of the good conduct of his representative, or an insurer against his violence resulting from his own malice or ill will, or sudden outbursts of temper, although in charge of the [employer]'s business; but only when he puts in such representative as is by him known, or ought to have been known, to be violent and mean, and the injury is the natural result of such character.

Id. at 364, 38 S.E. at 912. Accordingly, because the supervisor was unfit, and the employer should have known of the supervisor's unfitness, the employer could be liable under a negligent hiring theory. *Id.* at 364–65, 38 S.E. at 912.

¶ 85 We again addressed the tort of negligent hiring in *Walters v. Durham Lumber Co.*, 163 N.C. 536, 538, 80 S.E. 49, 50 (1913). We stated that an employer "is held . . . to the exercise of reasonable care in selecting employees who are competent and fitted for the work in which they are engaged." *Id.* at 541, 80 S.E. at 51. Thus, we held that

> [t]he burden of proving negligence in selecting or continuing an unfit [employee] is upon the plaintiff. He must prove (1) the specific negligent act on which the action is founded, which may, in some cases, but not generally, be such as to prove incompetency, but never can, of itself, prove notice to the [employer]; (2) incompetency, by inherent unfitness or previous specific acts of negligence, from which incompetency may be inferred; and (3) either actual notice to the [employer] of such unfitness or bad habits, or constructive notice, by showing that the [employer] could have known the facts had he used ordinary care in oversight and supervision, or by proving general reputation of the [employee] for incompetency or negligence; and (4) that the injury complained of resulted from the incompetency proved.

Id. (internal quotation marks omitted). We further clarified that "incompetency" is not limited "to a lack of physical capacity or natural mental gifts or of technical training when such training is required, but it extends

to any kind of unfitness which renders the employment or retention of the [employee] dangerous." *Id.* at 542, 80 S.E. at 52 (internal quotation marks omitted). Thus, we held that whether an employee was unfit and whether an employer had notice of the unfitness were questions for the jury. *Id.* at 543, 80 S.E. at 52.

¶ 86 In *Lamb* and *Walters*, this Court referred to the "incompetence" of the employee. The term "incompetent" is now often understood to refer to a person's mental fitness. *See Incompetent Person*, Ballentine's Law Dictionary (3d ed. 2010) ("[O]ne lacking competency, physical or mental. Usually having reference in the law to an insane or feeble-minded person."). As used in *Lamb* and *Walters*, however, "incompetent" is synonymous with "unfitness." *See Lamb*, 128 N.C. at 363, 38 S.E. at 912 ("[T]he evidence show[ed] that [the employee] was unfit and incompetent to perform the duties of supervising children and the help under him . . . ."); *Walters*, 163 N.C. at 542, 80 S.E. at 52 (holding that "incompetency" properly "extends to any kind of unfitness which renders the employment or retention of the [employee] dangerous." (internal quotation marks omitted)); *see also Incompetency*, Black's Law Dictionary (1st ed. 1891) ("Lack of ability . . . or fitness to discharge the required duty."). Accordingly, the proper inquiry is whether an employee was unfit for the work the employee was hired to perform.

¶ 87 During the jury charge conference, the trial court proposed using the pattern jury instructions for common law negligence. Defendant twice objected to the trial court's proposed instructions and requested that the trial court instead use N.C. Pattern Jury Instruction 640.42, titled "Employment Relationship—Liability of Employer for Negligence in Hiring, Supervision, or Retention of an Employee." In addition to the elements from *Medlin*, that instruction included the disputed factors from *Little* and a requirement that the employee be found "incompetent." These latter two requirements, which this Court has now correctly deemed too inflexible, made the defendant's requested jury instruction partially inappropriate for this case. The trial court, however, declined to use any aspect of defendant's requested jury instruction on negligent hiring. Instead, the trial court instructed the jury only on ordinary common law negligence. Defendant then renewed its objection after the trial court instructed the jury. In response, the trial court stated, "I'll, again, overrule [the objections], but they are preserved for the record." Thus, defendant requested a specific instruction during the jury charge conference and objected to the trial court's instructions both before and after the instructions were given. Accordingly, defendant's objections to the jury instructions were properly preserved for appellate review.

¶ 88 The majority has properly "concluded that the Keiths' claim was a claim for negligence dependent on a theory of negligent hiring." As the majority also notes, "[w]here our precedent requires an element to support a claim or theory, the jury should be instructed to this effect." By instructing only on ordinary common law negligence, however, the trial court did not require the jury to find: (1) that Clark was unfit for the work she was hired to perform; (2) that defendant had notice of Clark's unfitness; or (3) that there was a nexus between the employment relationship and the injury. These are factual questions that must be resolved by a jury. As the majority notes, "in this case, the jury, not the court, must decide the outcome of the Keiths' claim." Because the jury was not properly instructed on the elements of negligent hiring and retention, defendant was prejudiced. Accordingly, I would reverse the Court of Appeals and remand this case for a new trial. Therefore, I respectfully concur in part and dissent in part.

Justice BERGER dissenting.

¶ 89 This Court has recognized the law's reluctance to hold individuals and organizations responsible for the criminal acts committed by others. *See Stein v. Asheville City Bd. Of Educ.*, 360 N.C. 321, 328, 626 S.E.2d 263, 268 (2006). Where no duty exists, liability should not be imposed. Today's opinion, however, increases the business community's exposure to liability for the intentional and unforeseeable acts of their employees. Because the Court of Appeals properly reversed and remanded to the trial court for entry of judgment notwithstanding the verdict in favor of defendant, I respectfully dissent.

¶ 90 To establish a claim for negligence, a plaintiff must show "the existence of a legal duty or obligation, breach of that duty, proximate cause and actual loss or damage." *Little v. Omega Meats I, Inc.*, 171 N.C. App. 583, 586, 615 S.E.2d 45, 48 (2005). "[T]he threshold question is whether [a] plaintiff[ ] successfully allege[s] [a] defendant had a legal duty to avert the attack on [plaintiff]." *Stein*, 360 N.C. at 328, 626 S.E.2d at 267. Absent this legal duty, a defendant cannot be liable to a plaintiff for negligence. This Court has recognized that, "[n]o legal duty exists unless the injury to the plaintiff was foreseeable and avoidable through due care." *Id.* Moreover, foreseeability generally depends on the facts of the particular case. *Id.* at 328, 626 S.E.2d at 267–68.

¶ 91 In cases where a plaintiff asserts liability founded on a defendant's relationship to a third party who injured them, the establishment of a legal duty hinges on whether defendant held a special relationship with

the third party. *See Id.* at 329, 626 S.E.2d at 268. This Court explained further that:

> [N]o special relationship exists between a defendant and a third person unless (1) the defendant knows or should know of the third person's violent propensities and (2) the defendant has the ability and opportunity to control the third person at the time of the third person's criminal acts.

Id. at 330, 626 S.E.2d at 269. Under a negligence theory, employment alone does not establish a special relationship.

¶ 92 In *Stein*, the plaintiffs brought a negligence claim against the defendant for the actions of third parties. *Id.* at 328, 626 S.E.2d at 268. There, the plaintiffs rested their claim on the failure of the defendant, a special school for behaviorally and emotionally handicapped children, to take reasonable steps to stop two gunmen who were students at the school. *Id.* This Court noted that the plaintiffs' asserted liability depended on whether the defendant's relationship with the gunmen amounted to a special relationship which would impose a duty on the defendant. *Id.* at 329, 626 S.E.2d at 268. Because the shooting occurred "entirely outside of [the] defendant's custody" as it took place well after normal school hours and not on property belonging to the defendant, this Court concluded that the defendant did not owe the plaintiff a legal duty to prevent the shooting. *Id.* at 332, 626 S.E.2d at 270.

¶ 93 Here, the claim against defendant based on the actions of Clark similarly hinges on whether a legal duty existed. Defendant could not have known or reasonably anticipated that Clark was a violent individual who would engage in a home invasion and armed robbery. After all, at worst, Clark's previous convictions were for non-violent misdemeanors, and defendant had not received any complaints concerning Clark's work or character. Moreover, at the time of the robbery, defendant had no ability or authority to exercise supervision or control over Clark's actions. The robbery in the instant case took place outside of Clark's normal working hours. An employer is not the guarantor of employee conduct at all times and for all purposes. Defendant did not and could not have reasonably anticipated that Clark would orchestrate a home invasion and armed robbery against one of defendant's clients. Because Clark's intentional criminal acts were not foreseeable, defendant did not owe plaintiffs a legal duty.

¶ 94 For similar reasons, I would also conclude that the Court of Appeals correctly determined that plaintiffs' evidence was insufficient

to establish a claim upon the theory of negligent hiring. As stated above, before an employer may be held liable to a plaintiff for negligent hiring, it must be shown that the employer owes the plaintiff a legal duty. *Little*, 171 N.C. App. at 587, 615 S.E.2d at 48.

¶ 95 The Court of Appeals in *Little* delineated three factors to determine when an employer owes a duty to a plaintiff under a negligent hiring theory:

> (1) [T]he employee and the plaintiff must have been in places where each had a right to be when the wrongful act occurred; (2) the plaintiff must have met the employee as a direct result of the employment; and (3) the employer must have received some benefit, even if only potential or indirect, from the meeting of the employee and the plaintiff.

171 N.C. at 588, 615 S.E.2d at 49. Courts decline to hold employers "liable for the acts of their . . .employees under the doctrine of negligent hiring or retention when *any one* of these three factors [i]s not proven." *Id.* at 588, S.E.2d at 49.

¶ 96 Here, Clark did not have a right to be in plaintiff's home and was not acting as a health care aide at the time the home invasion and robbery were committed. In addition, defendant has not received any benefit from Clark's actions in orchestrating the robbery. To the contrary, defendant's reputation is undoubtedly damaged due to Clark's actions. While Clark did indeed meet plaintiffs through her employment, all three factors must be met for a duty to be established. As a result, I would affirm the Court of Appeals.

KNC TECHNOLOGIES, LLC
v.
ERIC TUTTON AND i-TECH SECURITY AND NETWORK SOLUTIONS, LLC

No. 277A21

Filed 17 June 2022

Appeal and Error—interlocutory orders—of a business court judge—statement of grounds for appellate review

An appeal from a partial summary judgment order in a mandatory complex business case was dismissed where appellant failed to show that the order affected a substantial right or satisfied any of the other requirements under N.C.G.S. § 7A-27(a)(3) for an appeal as of right from an interlocutory order of a business court judge. Specifically, appellant's statement for the grounds of appellate review in its brief contained only bare assertions that the order met section 7A-27(a)(3)'s requirements while failing to allege sufficient facts and arguments to support those assertions.

Appeal pursuant to N.C.G.S. § 7A-27(a)(3) from an order and opinion on plaintiff's motion for partial summary judgment and defendants' motion for summary judgment entered on 8 April 2021 by Judge Gregory P. McGuire, Special Superior Court Judge for Complex Business Cases, in Superior Court, Davidson County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(a). Heard in the Supreme Court on 9 May 2022.

Matthew W. Georgitis, Alexander L. Turner, and R. Matthew Van Sickle for plaintiff-appellant.

D. Stuart Punger Jr. for defendant-appellees.

BARRINGER, Justice.

¶ 1 In this matter, the appellant KNC Technologies, LLC noted an appeal as of right of an interlocutory order but has failed to show that the order affects a substantial right or otherwise satisfies the requirements for an appeal as of right to this Court from an interlocutory order of a business court judge. *See* N.C.G.S. § 7A-27(a)(3) (2021). Accordingly, we dismiss the appeal.

¶ 2 Pursuant to N.C.G.S. § 7A-27(a)(3), an appeal of right lies to this Court from an interlocutory order of a business court judge only if it "[a]ffects a substantial right," "[i]n effect determines the action and prevents a judgment from which an appeal might be taken," "[d]iscontinues the action," or "[g]rants or refuses a new trial." N.C.G.S. § 7A-27(a)(3). "It is the appellant's burden to present appropriate grounds for . . . acceptance of an interlocutory appeal, . . . and not the duty of this Court to construct arguments for or find support for appellant's right to appeal[.]" *Hanesbrands Inc. v. Fowler*, 369 N.C. 216, 218 (2016) (alterations in original) (quoting *Johnson v. Lucas*, 168 N.C. App. 515, 518, *aff'd per curiam*, 360 N.C. 53 (2005)). Additionally, "the North Carolina Rules of Appellate Procedure require that the appellant's brief contain a 'statement of the grounds for appellate review,' which must allege 'sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.' " *Id.* at 219 (quoting N.C. R. App. P. 28(b)(4)).

¶ 3 The appellant must present more than a bare assertion that the order affects a substantial right, in effect determines the action and prevents a judgment from which an appeal might be taken, discontinues the action, or grants or refuses a new trial. *See id.*; *see also* N.C. R. App. P. 28(b)(4). Appellants must demonstrate why the order has the claimed effect under N.C.G.S. § 7A-27(a)(3). *See Hanesbrands*, 369 N.C. at 219; *see also* N.C. R. App. P. 28(b)(4). If an appellant fails to carry its burden to present appropriate grounds for an interlocutory appeal as of right, this Court will on its own motion dismiss the appeal. *Waters v. Qualified Pers., Inc.*, 294 N.C. 200, 201 (1978) ("If an appealing party has no right of appeal, an appellate court on its own motion should dismiss the appeal even though the question of appealability has not been raised by the parties themselves." (footnote omitted)); *cf. Hanesbrands*, 369 N.C. at 218 ("An appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to appellant if not corrected before appeal from final judgment." (cleaned up)).

¶ 4 KNC Technologies acknowledges that it has appealed an interlocutory order. However, KNC Technologies' basis for this Court's review is limited to two statements: (1) that the interlocutory order affects a substantial right because the trial court "erroneously denied" its partial summary judgment motion on various claims and (2) that the order in effect determines the action and prevents a judgment from which an appeal might be taken because "[t]he denial of summary judgment prevents entry of a final order on those claims from which [KNC Technologies]

might appeal." This is a bare assertion, which is clearly not sufficient to satisfy an appellant's burden to present appropriate grounds for an interlocutory appeal as of right to this Court. Therefore, we dismiss KNC Technologies' appeal.

DISMISSED.

DAWN REYNOLDS-DOUGLASS
v.
KARI TERHARK

No. 43A21

Filed 17 June 2022

Attorney Fees—contract to purchase real estate—obligation to pay earnest money deposit and due diligence fee—evidence of indebtedness

After a buyer breached a contract to purchase real estate, which provided that the prevailing party in an action to recover the earnest money deposit would be entitled to collect "reasonable" attorney fees from the opposing party, the district court properly awarded attorney fees to the seller in her action to recover the earnest money deposit (and a due diligence fee) from the buyer. The contract—as a printed instrument signed by both parties that, on its face, evidenced a legally enforceable obligation for the buyer to pay both the deposit and the fee to the seller—constituted an "evidence of indebtedness" for purposes of N.C.G.S. § 6-21.1 (allowing parties to any "evidence of indebtedness" to recover attorney fees resulting from a breach). Further, the court did not err in awarding attorney fees exceeding the statutory cap set forth in section 6-21.2 because the additional amount represented what the seller incurred in the course of defending the award she initially received from a magistrate (and which the buyer appealed to the district court).

Justice BERGER dissenting.

Justice BARRINGER joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, No. COA-20-112, 2020

WL 7974326 (N.C. Ct. App. Dec. 31, 2020), finding no error in an order entered on 20 September 2019 by Judge Ned W. Mangum in District Court, Wake County. Heard in the Supreme Court on 14 February 2022.

David G. Omer for plaintiff-appellee.

Williams Mullen by Michael C. Lord for defendant-appellant.

ERVIN, Justice.

¶ 1 This case involves the issue of whether the trial court erred by awarding attorney's fees in an action seeking the recovery of money owed under a contract to purchase real estate which obligated the buyer to pay the seller a due diligence fee and an earnest money deposit. After the buyer breached the real estate contract, the seller brought an action in small claims court for the purpose of recovering the due diligence fee that was owed to her pursuant to that agreement. The real estate contract also provided that the prevailing party in an action seeking to recover the earnest money deposit was entitled to collect "reasonable attorney's fees" from the opposing party. After the trial court awarded the requested attorney's fees on appeal from a decision of the magistrate in plaintiff's favor, the buyer appealed, arguing that the contract did not constitute an "evidence of indebtedness" pursuant to N.C.G.S. § 6-21.2 and that the requested attorney's fee award lacked sufficient support in the relevant statutory provision. A majority of the Court of Appeals found no error in the challenged attorney's fees award. After careful consideration of the record in light of the applicable law, we affirm the decision of the Court of Appeals.

¶ 2 In mid-2017, plaintiff Dawn Reynolds-Douglass and her husband employed a real estate agent named Dee Love to assist them in listing their home for sale. As part of that process, Ms. Love advised plaintiff and her husband to complete a "Residential Property and Owners' Association Disclosure Statement" as required by Chapter 47E of the General Statutes of North Carolina. Plaintiff and her husband completed the required disclosure statement, except for leaving two items blank, the first of which addressed whether the property was "subject to any utility or other easements, shared driveways, party walls or encroachments" and the second of which addressed whether "any fees [were] charged by the association or by the association's management company in connection with the conveyance or transfer of the lot or property to a new owner."

¶ 3 On 23 July 2017, Ms. Love hosted an open house at which plaintiff's residence could be viewed by potential buyers, including defendant Kari Terhark. On the following day, defendant met with Ms. Love for the purpose of reviewing the disclosure statement that plaintiff and her husband had completed. At the conclusion of the review process, defendant signed each page of the disclosure statement and executed an "Offer to Purchase and Contract" in which she agreed to purchase plaintiff's property for $250,000. The Offer to Purchase and Contract provided, in pertinent part:

> (d) "Purchase Price":
>
> $250,000.00 paid in U.S. Dollars upon the following terms:
>
> $2,000.00 BY DUE DILIGENCE FEE made payable and delivered to Seller by the Effective Date.
>
> . . . .
>
> $2,500.00 BY (ADDITIONAL) EARNEST MONEY DEPOSIT made payable and delivered to Escrow Agent named in Paragraph 1(f) by cash, official bank check, wire transfer or electronic transfer no later than August 14, 2017 . . . .
>
> . . . .
>
> $245,500.00 BALANCE of the Purchase Price in cash at Settlement (some or all of which may be paid with the proceeds of a new loan).

In addition, the Offer to Purchase and Contract provided:

> (e) "Earnest Money Deposit": The Initial Earnest Money Deposit, the Additional Earnest Money Deposit and any other earnest monies paid or required to be paid in connection with this transaction, collectively the "Earnest Money Deposit," shall be deposited and held in escrow by Escrow Agent until Closing, at which time it will be credited to Buyer, or until this Contract is otherwise terminated. . . . In the event of breach of this Contract by Buyer, the Earnest Money Deposit shall be paid to Seller as liquidated damages and as Seller's sole and exclusive remedy for such breach, but without limiting Seller's rights under Paragraphs 4(d) and 4(e) for damage to the

> Property or Seller's right to retain the Due Diligence Fee. It is acknowledged by the parties that payment of the Earnest Money Deposit to Seller in the event of a breach of this Contract by Buyer is compensatory and not punitive, such amount being a reasonable estimation of the actual loss that Seller would incur as a result of such breach. The payment of the Earnest Money Deposit to Seller shall not constitute a penalty or forfeiture but actual compensation for Seller's anticipated loss, both parties acknowledging the difficulty [of] determining Seller's actual damages for such breach. If legal proceedings are brought by Buyer or Seller against the other to recover the Earnest Money Deposit, the prevailing party in the proceeding shall be entitled to recover from the non-prevailing party reasonable attorney fees and court costs incurred in connection with the proceeding.
>
> . . . .
>
> (i) "Due Diligence Fee": A negotiated amount, if any, paid by Buyer to Seller with this Contract for Buyer's right to terminate the Contract for any reason or no reason during the Due Diligence Period. It shall be the property of Seller upon the Effective Date and shall be a credit to Buyer at Closing. The Due Diligence Fee shall be non-refundable except in the event of a material breach of this Contract by Seller . . . .

On the same date, plaintiff and her husband accepted defendant's offer by initialing each page of the Offer to Purchase and Contract and signing the final page. After both parties had executed the Offer to Purchase and Contract, plaintiff and her husband removed their residence from the real estate market in anticipation of closing.

¶ 4 On 27 July 2017, defendant sent an e-mail to Ms. Love in which she stated that she intended to cancel the contract unless plaintiff and her husband agreed to reduce the purchase price by $5,500. In response, Ms. Love told defendant that she was in breach of the contract that she had made with plaintiff and plaintiff's husband. Defendant did not pay the $2,000 due diligence fee or the $2,500 earnest money deposit fee that were due to plaintiff and plaintiff's husband under the contract, with further negotiations that were intended to facilitate a closing ultimately proving unsuccessful.

¶ 5 On 29 September 2017, plaintiff, proceeding *pro se*, filed a complaint against defendant in small claims court seeking to recover the $2,000 due diligence fee. On 30 October 2017, the magistrate entered a judgment in favor of plaintiff and against defendant in the amount of $2,000. After defendant noted an appeal to the district court from the magistrate's judgment, the matter was referred to arbitration on 24 January 2018, with the arbitrator ultimately entering an award in the amount of $2,000 in favor of plaintiff. On 26 January 2018, defendant filed a separate claim against plaintiff in small claims court in which she sought $4,500 in damages and alleged that plaintiff had breached the purchase contract and was in "violation of the Property Disclosure Act" and in "violation of form 352-T," with plaintiff having retained an attorney in light of the filings of defendant's separate claim.

¶ 6 On or about 27 April 2018, plaintiff, acting through counsel, filed an amended complaint in which she sought to recover $2,000 for non-payment of the due diligence fee; $2,500 in damages for non-payment of the earnest money deposit; attorney's fees and court costs; and $9,000 in compensatory damages, an amount which plaintiff claimed to be the "reasonable difference between (i) the purchase price of the Property pursuant to the Agreement and (ii) the market value of the Property after it had to be re-listed." On 29 June 2018, defendant, who was also acting through an attorney at this point in the litigation, filed an answer to plaintiff's amended complaint. On 20 December 2018, plaintiff filed a motion seeking the entry of summary judgment in her favor, with defendant having filed a cross-motion seeking summary judgment in her own favor on 4 February 2019.

¶ 7 On 26 February 2019, the trial court entered an order granting summary judgment in favor of plaintiff. On 19 September 2019, plaintiff filed a motion seeking to have the trial court determine the amount of damages that she was entitled to recover and an application seeking an award of $15,564.74 in fees and costs, including attorney's fees, with plaintiff's counsel having asserted in an attached affidavit that plaintiff had incurred $13,067.70 in attorney's fees and $577.04 in court costs in prosecuting this action and $1,920 in attorney's fees relating to a bankruptcy petition that defendant had also filed. On 20 September 2019, the trial court entered an order finding that plaintiff was entitled to recover $18,343.92 from defendant, including $2,000 relating to the due diligence fee; $2,500 relating to the earnest money deposit; $776.22 in pre-judgment interest relating to the due diligence fee and earnest money deposit; and $13,067.70 in attorney fees. Defendant noted an appeal to the Court of Appeals from the trial court's order.

¶ 8 In seeking relief from the trial court's order before the Court of Appeals, defendant, proceeding *pro se*, argued that the trial court had erred by (1) granting summary judgment in plaintiff's favor in spite of the existence of genuine issues of material fact concerning the extent to which plaintiff had complied with the Residential Property Disclosure Act; (2) denying defendant's summary judgment motion; and (3) finding that plaintiff was entitled to recover attorney's fees. In rejecting defendant's challenge to the trial court's decision to enter summary judgment in plaintiff's favor with respect to the merits of plaintiff's claim, the Court of Appeals held that the trial court had correctly concluded that there were no genuine issues of material fact concerning the extent to which plaintiff was entitled to recover the due diligence fee and earnest money deposit from defendant. *Reynolds-Douglass v. Terhark*, No. COA-20-112, 2020 WL 7974326, at *2 (N.C. Ct. App. Dec. 31, 2020) (unpublished). In reaching this result, the Court of Appeals noted that plaintiff had filled out a standard disclosure statement; that defendant had "attested that she had received and examined [the s]tatement by signing each page, including the pages upon which [the inadvertently missing items] appeared"; that defendant had been "given the opportunity to read and review both documents"; that defendant had "attested that she did so" without having sought clarification regarding the statement before making an offer to purchase the property; and that defendant "did not argue that the Disclosure Statement was invalid until well after litigation had commenced in this matter." *Reynolds-Douglass*, 2020 WL 7974326, at *3.

¶ 9 In rejecting defendant's challenge to the trial court's attorney's fees award, the Court of Appeals held that the trial court had correctly awarded $13,067.70 in attorney's fees to plaintiff. *Id.* After noting that a party attempting to overturn an award of attorney's fees must prove that the trial court had abused its discretion, the Court of Appeals determined that defendant had not "challenge[d] the amount of the attorney's fees award, only the award itself." *Id.* According to the Court of Appeals, the trial court was authorized to award attorney's fees in this case pursuant to N.C.G.S. § 6-21.2, which provides that "parties to 'any note, conditional sale contract or other evidence of indebtedness' [can] recover attorney's fees resulting from a breach of the same, 'not in excess of fifteen percent (15%) of the outstanding balance owing.' " *Reynolds-Douglass*, 2020 WL 7974326, at *4 (citing N.C.G.S. § 6-21.2). In the Court of Appeals' view, the Offer to Purchase and Contract, which obligated defendant to pay the due diligence fee and earnest money deposit to plaintiff and provided that, "[i]f legal proceedings [we]re brought by Buyer or Seller against the other to recover the Earnest Money Deposit, the prevailing party in the proceeding shall be entitled to recover from the non-prevailing

party reasonable attorney's fees and costs incurred in connection with the proceeding," constituted an "evidence of indebtedness" for purposes of N.C.G.S. § 6-21.2, so that an award of attorney's fees was authorized in this instance. *Reynolds-Douglass*, 2020 WL 7974326, at *3–4. In reaching this conclusion, the Court of Appeals relied upon *Stillwell Enters., Inc. v. Interstate Equip. Co.*, 300 N.C. 286 (1980), in which this Court determined that "[t]he term 'evidence of indebtedness' as used in N.C.[G.S.] § 6-21.2 refers to any printed or written instrument, signed or otherwise executed by the obligor(s), which evidences on its face a legally enforceable obligation to pay money." *Reynolds-Douglass*, 2020 WL 7974326, at *4 (quoting *Stillwell*, 300 N.C. at 294). In light of the fact that the Offer to Purchase and Contract in this case "was a printed instrument signed by both parties" which "on its face evidenced a legally enforceable obligation for Defendant to pay the Due Diligence fee and Earnest Money Deposit to Plaintiff," the Court of Appeals reasoned that the contract constituted an "evidence of indebtedness" for purposes of N.C.G.S. § 6-21.2, so that the trial court was authorized to make an award of attorney's fees in plaintiff's favor. *Id.*

¶ 10 Although Judge Murphy agreed with his colleagues in concluding that the trial court had not erred by granting summary judgment in plaintiff's favor, he disagreed with his colleagues' decision to uphold the trial court's attorney's fees award. *Reynolds-Douglass*, 2020 WL 7974326, at *5 (Murphy, J., concurring, in part, and dissenting, in part). As an initial matter, Judge Murphy concluded that the Offer to Purchase and Contract did not authorize the recovery of attorney's fees because the appropriateness of such an award hinged upon whether "legal proceedings [we]re brought . . . to recover the Earnest Money Deposit" and because this proceeding had initially been brought for the purpose of recovering the due diligence fee rather than the earnest money deposit. *Reynolds-Douglass*, 2020 WL 7974326, at *5–6.

¶ 11 In addition, Judge Murphy concluded that N.C.G.S. § 6-21.2 did not authorize an award of attorney's fees in this case given that the Offer to Purchase and Contract did not constitute an "evidence of indebtedness" or a "note or conditional sale contract" as required by the relevant statutory provision. *Reynolds-Douglass*, 2020 WL 7974326, at *6. According to Judge Murphy, the majority at the Court of Appeals had erroneously extended *Stillwell* to encompass a real estate contract even though the principle enunciated in *Stillwell* was "only relevant for commercial transactions" in light of our statements that the definition of an "evidence of indebtedness" adopted in that case did "no violence to any of the statute's specific provisions and accords well with its general

purpose to validate a debt collection remedy expressly agreed upon by contracting parties" and that N.C.G.S. § 6-21.2 was intended to "supplement those principles of law generally applicable to commercial transactions." *Reynolds-Douglass*, 2020 WL 7974326, at *7 (quoting *Stillwell*, 300 N.C. at 293–94). As a result, Judge Murphy would have held that the Offer to Purchase and Contract at issue in this case was not an "evidence of indebtedness" for purposes of *Stillwell* and that his colleagues' determination to the contrary was "overbroad" and would authorize an award of attorney's fees pursuant to "every contract where one party is to pay money [as an] evidence of indebtedness." *Id.*

¶ 12 In the same vein, Judge Murphy would have held that the Offer to Purchase and Contract was not an "evidence of indebtedness" for purposes of the relevant statutory provision given that "[t]he general purpose of N.C.G.S. § 6-21.2 is to 'validate a debt collection remedy expressly agreed upon by contracting parties' " and that, at least in his view, a contract to purchase real estate did not fit within the confines of this stated purpose. *Reynolds-Douglass*, 2020 WL 7974326, at *8. Finally, Judge Murphy noted that, even if the Offer to Purchase and Contract in this case constituted an "evidence of indebtedness" for purposes of N.C.G.S. § 6-21.2, the amount of attorney's fees awarded in this case should be capped at 15% of the $2,000 due diligence fee, making the trial court's decision to award a total of $13,067.70 in attorney's fees unlawfully excessive. *Id.* Defendant noted an appeal to this Court from the Court of Appeals' decision based upon Judge Murphy's dissent.[1]

¶ 13 In seeking relief from the Court of Appeals' decision before this Court, defendant, who is currently represented by counsel, begins by arguing that the Offer to Purchase and Contract did not authorize an award of attorney's fees in plaintiff's favor given that, while the contract authorized such an award in an action brought "to recover the Earnest Money Deposit," the present case had been initiated for the purpose of recovering the due diligence fee. In view of the fact that she had never paid the earnest money deposit to plaintiff, defendant contends that there had never been an earnest money deposit that plaintiff was entitled to recoup and that the $2,500 amount that plaintiff was authorized to collect pursuant to the Offer to Purchase and Contract relating to the earnest money deposit constituted nothing more than an award of liquidated damages.

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1. Although defendant sought discretionary review of the Court of Appeals' decision with respect to certain additional issues, this Court denied defendant's petition.

¶ 14 Secondly, defendant argues that the Offer to Purchase and Contract did not constitute an "evidence of indebtedness" for purposes of N.C.G.S. § 6-21.2 as defined in *Stillwell* given that the relevant statutory provision "applies to 'supplement those principles of law generally applicable to commercial transactions' and is only relevant for financial debt instruments akin to promissory notes and conditional sale contracts." In defendant's view, neither the due diligence fee nor the earnest money deposit resemble the recurring rental payments provided for in the lease agreement that was at issue in *Stillwell*, with the essential thrust of the Offer to Purchase and Contract as a real estate agreement precluding it from being "an instrument of indebtedness within the scope of Section 6-21.2[ ]." As further support for this contention, defendant directs our attention to *Forsyth Mun. Alcoholic Beverage Control Bd. v. Folds*, 117 N.C. App. 232, 238 (1994), which she describes as holding that attorney's fees could not be collected in an action arising from the breach of a contract for the sale of real property, and *Calhoun v. WHA Med. Clinic, PLLC*, 178 N.C. App. 585, 604 (2006), in which the Court of Appeals analyzed whether an employer-employee agreement came within the scope of N.C.G.S. § 6-21.2. As a result, defendant contends that the Court of Appeals' determination that the Offer to Purchase and Contract constituted an "evidence of indebtedness" conflicts with the purpose sought to be served by N.C.G.S. § 6-21.2, which is to "validate a debt collection remedy expressly agreed upon by contracting parties." *Stillwell*, 300 N.C. at 294.

¶ 15 Thirdly, defendant argues that, in accordance with the literal language of the Offer to Purchase and Contract, she cannot be held liable to plaintiff for the earnest money deposit given that the deposit was to be "payable and delivered to Escrow Agent." Defendant asserts that her obligation to pay the earnest money deposit had not "matured" at the time that the agreement was cancelled on 27 July 2017 since the earnest money deposit was not due to be paid until 14 August 2017. Defendant also notes that N.C.G.S. § 6-21.2(5) requires a party seeking to recover attorney's fees to provide notice to the debtor "that the provisions relative to payment of attorneys' fees in addition to the 'outstanding balance' [of the debt] shall be enforced" and contends that plaintiff had failed to provide proper notice that she intended to seek an award of attorney's fees in this action. Finally, defendant claims that Judge Murphy correctly concluded that the trial court's decision to award a total of $13,067.70 in attorney's fees violated the statutory cap on attorney's fees awards set out in N.C.G.S. § 6-21.2.

¶ 16 In seeking to persuade us to affirm the Court of Appeals' decision, plaintiff begins by arguing that defendant's contentions that the earnest

money deposit was owed to the escrow agent rather than plaintiff, that plaintiff's claim for the earnest money deposit had not "matured," and that plaintiff had failed to provide proper notice of its attorney's fees claim were not properly before this Court given that these issues had not been mentioned by either the majority or dissenting opinions at the Court of Appeals, citing N.C. R. App. P. 16(b) (providing that, "[w]hen the sole ground of the appeal of right is the existence of a dissent in the Court of Appeals," this Court's review "is limited to a consideration of those issues that are . . . specifically set out in the dissenting opinion as the basis for that dissent"). In addition, plaintiff contends that she was allowed to collect attorney's fees under the contract pursuant to N.C.G.S. § 6-21.2 given that the Offer to Purchase and Contract expressly allowed for the recovery of attorney's fees by "the prevailing party" in a proceeding brought to recover the earnest money deposit.

¶ 17 According to plaintiff, defendant's contention that the Offer to Purchase and Contract does not constitute an "evidence of indebtedness" as defined in *Stillwell* is "inconsistent with both established case law and the plain language of" N.C.G.S. § 6-21.2. More specifically, plaintiff contends that the Offer to Purchase and Contract is "(i) a printed or written instrument, (ii) signed or otherwise executed by the obligor(s), (iii) which evidences on its face a legally enforceable obligation to pay money," with this being all that is required of an "evidence of indebtedness" in accordance with *Stillwell*, 300 N.C. at 294. In plaintiff's view, defendant's assertion that N.C.G.S. § 6-21.2 only applies to "commercial" agreements lacks merit given that nothing in the relevant statutory language limits the applicability of N.C.G.S. § 6-21.2 to commercial agreements, with plaintiff having pointed to the decisions of the Court of Appeals in *Crist v. Crist*, 145 N.C. App. 418 (2001) (holding that a promissory note provided in the context of a domestic relations dispute was subject to N.C.G.S. § 6-21.2), and *Four Seasons Homeowners Ass'n, Inc. v. Sellers*, 72 N.C. App. 189, 192 (1984) (holding that a "Declaration of Covenants, Conditions and Restrictions" applicable to a subdivision constituted an "evidence of indebtedness" for purposes of N.C.G.S. § 6-21.2), as further support for this contention. According to plaintiff, treating the Offer to Purchase and Contract as an "evidence of indebtedness" is "directly" consistent with the purpose sought to be served by N.C.G.S. § 6-21.2, which is intended to "validate a debt collection remedy expressly agreed upon by contracting parties." *Stillwell*, 300 N.C. at 294.

¶ 18 Finally, plaintiff asserts that she is entitled to retain the full amount of the trial court's attorney's fees award, with the $13,067.70 amount set out in the trial court's order not being excessive given that she had

incurred these fees in the course of defending the judgment that she had previously obtained before the magistrate and that was affirmed multiple times throughout defendant's subsequent appeals. More specifically, plaintiff asserts that, although she represented herself in the initial small claims proceeding before the magistrate and in the subsequent arbitration proceeding, she had decided that she needed to hire an attorney after defendant sought relief from the magistrate's decision and the arbitrator's award and asserted separate claims against plaintiff. In the absence of an award of attorney's fees "for time expended in defense of" her judgment, plaintiff contends that it would not have been "economically feasible . . . to try and preserve that judgment," citing *City Fin. Co. of Goldsboro v. Boykin*, 86 N.C. App. 446, 449 (1987) (holding that, "[u]pon a finding that defendants were entitled to attorney's fees in obtaining their judgment, any effort by defendants to protect that judgment" during subsequent appeals "should likewise entitle them to attorney's fees"), and *Eley v. Mid/East Acceptance Corp. of N.C.*, 171 N.C. App. 368, 377 (2005) (holding that, "because plaintiff was entitled to attorneys' fees for hours expended at the trial level, we hold plaintiff is entitled to attorneys' fees on appeal, especially in light of the limited amount of money at issue in the litigation"). As a result, plaintiff urges us to affirm the Court of Appeals' decision in its entirety.

¶ 19 According to well-established North Carolina law, "to overturn the trial judge's determination on the issue of attorneys' fees, the defendant must show an abuse of discretion," unless the "appeal presents a question of statutory interpretation," in which case "full review is appropriate," with the trial court's conclusions of law being subject to de novo review. *Finch v. Campus Habitat, L.L.C.*, 220 N.C. App. 146, 147 (2012) (quoting *Bruning & Federle Mfg. Co. v. Mills*, 185 N.C. App. 153, 155–56 (2007)). As a result, we will decide any issues of statutory construction de novo while evaluating the nature and extent of any statutorily authorized attorney's fees awards for an abuse of discretion.

¶ 20 "[T]he general rule [in North Carolina] has long obtained that a successful litigant may not recover attorneys' fees, whether as costs or as an item of damages, unless such a recovery is expressly authorized by statute." *Stillwell*, 300 N.C. at 289 (citing *Hicks v. Albertson*, 284 N.C. 236 (1973)). According to N.C.G.S. § 6-21.2, which authorizes an award of attorney's fees in certain actions,

> [o]bligations to pay attorney['s] fees upon any note, conditional sale contract or other evidence of indebtedness, in addition to the legal rate of interest or finance charges specified therein, shall be valid and

> enforceable, and collectible as part of such debt, if such note, contract or other evidence of indebtedness be collected by or through an attorney at law after maturity, subject to the following provisions:
>
> (1) If such note, conditional sale contract or other evidence of indebtedness provides for attorney['s] fees in some specific percentage of the "outstanding balance" as herein defined, such provision and obligation shall be valid and enforceable up to but not in excess of fifteen percent (15%) of said "outstanding balance" owing on said note, contract or other evidence of indebtedness.
>
> (2) If such note, conditional sale contract or other evidence of indebtedness provides for the payment of reasonable attorneys' fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the "outstanding balance" owing on said note, contract or other evidence of indebtedness.

N.C.G.S. § 6-21.2 (2021). As a result, N.C.G.S. § 6-21.2 creates an exception to the general rule providing that each party to civil litigation is responsible for bearing his or her own attorney's fees applicable to "any note, conditional sale contract, or other evidence of indebtedness." For that reason, the next issue that we must address is whether the Offer to Purchase and Contract comes within the ambit of N.C.G.S. § 6-21.2.

¶ 21 After carefully considering the record and the applicable law, we hold that the majority at the Court of Appeals correctly concluded that the Offer to Purchase and Contract at issue in this case constituted an "evidence of indebtedness" for purposes of N.C.G.S. § 6-21.2. In *Stillwell*, 300 N.C. at 287, this Court examined an agreement pursuant to which the defendant had leased a road scraper to the plaintiff. According to the lease agreement, the plaintiff was required to make "monthly rental payments" to the defendant, with the plaintiff "further agree[ing] to pay to lessor a reasonable attorney's fee if the obligation evidenced hereby be collected by an attorney at law after maturity." *Id.* at 289. After granting summary judgment in the defendant's favor following the plaintiff's refusal to make payments required under the lease, the trial court awarded over $24,000 to the defendant, with this amount having included more than $2,000 in attorney's fees. *Id.* at 288. Although the Court of Appeals vacated the trial court's attorney's fee award "on the grounds that the

lease was not the type of agreement which would entitle defendant to recover for attorneys' fees under the general provisions of [N.C.]G.S. [§] 6-21.2," this Court reinstated the trial court's decision on the grounds that the lease agreement did, in fact, constitute an "evidence of indebtedness" for purposes of N.C.G.S. § 6-21.2. *Id.* at 289, 294.

¶ 22 In construing the reference to an "evidence of indebtedness" contained in N.C.G.S. § 6-21.2, we began by acknowledging that we were required to "give that interpretation to the term at issue which best harmonizes with the language, spirit, and intent of the act in which it appears." *Id.* at 292 (citing *Stevenson v. City of Durham*, 281 N.C. 300 (1972)). After noting that N.C.G.S. § 6-21.2 had "become effective on the same date as the Uniform Commercial Code," we concluded that the relevant statutory provision "was intended to supplement those principles of law generally applicable to commercial transactions,"[2] *id.* at 293 (cleaned up), before holding that

> the term "evidence of indebtedness" in N.C.G.S. § 6-21.2 is intended to encompass more than security agreements or traditional debt financing arrangements. It is of course clear that a "note" or "conditional sale contract" is the most common type of "evidence of indebtedness" contemplated by the statute; indeed, it is in connection with these types of agreements that attorneys' fee provisions are most commonly employed. However, the express terms of Section 5 of the statute, along with the terms employed in other provisions, demonstrate that G.S. 6-21.2 applies not only to notes and conditional sale contracts, but also to such "other evidence of indebtedness" as "other writings evidencing an unsecured debt" or "any other such security agreement which evidences both a monetary obligation and a lease of specific goods." N.C.G.S. § 6-21.2(5). We agree, therefore, that "these provisions indicate, either explicitly or implicitly, that an evidence of indebtedness is a writing which acknowledges a debt or obligation and which is executed by the party obligated thereby."

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2. The fact that a particular statutory provision was enacted in part to "supplement" the law relating to "commercial transactions" does not, as matter of logic, mean that the application of the relevant statutory provision should be limited to such transactions in the event that the literal language of the statute suggests that it should be given a broader scope.

> More specifically, we hold that the term "evidence of indebtedness" as used in N.C.G.S. § 6-21.2 has reference to any printed or written instrument, signed or otherwise executed by the obligor(s), which evidences on its face a legally enforceable obligation to pay money. Such a definition, we believe, does no violence to any of the statute's specific provisions and accords well with its general purpose to validate a debt collection remedy expressly agreed upon by contracting parties.
>
> Viewed in light of this definition, defendant's lease agreement with plaintiff is obviously an "evidence of indebtedness." The contract acknowledges a legally enforceable obligation by plaintiff-lessee to remit rental payments to defendant-lessor as they become due, in exchange for the use of the property which is the subject of the lease. The contract, including the provision in Paragraph 21 for attorneys' fees, is in writing and is executed by the parties obligated under its terms. Plaintiff has made no assertion that the contract represents anything less than an arm's length transaction consummated by mutual agreement between the parties. Under these circumstances, we see no reason why the obligation by plaintiff to pay attorneys' fees incurred by defendant upon collection of the debts arising from the contract itself should not be enforced to the extent allowed by N.C.G.S. § 6-21.2.

Id. at 293–95 (cleaned up). Thus, the appropriate definition of an "evidence of indebtedness" for purposes of N.C.G.S. § 6-21.2 is the one that this Court enunciated in *Stillwell*.

¶ 23 As the Court of Appeals recognized, the Offer to Purchase and Contract at issue in this case was signed by both parties and, on its face, evidences a legally enforceable obligation that defendant pay the plaintiff both the due diligence fee and the earnest money deposit. As was the case in *Stillwell*, there has been "no assertion that the contract represents anything less than an arm's length transaction consummated by mutual agreement between the parties." *See Stillwell*, 300 N.C. at 294. In light of this set of circumstances, there is no reason for treating the attorney's fees provision contained in the Offer to Purchase and Contract as anything other than an "evidence of indebtedness" that is enforceable pursuant to N.C.G.S § 6-21.2.

¶ 24 A careful examination of the language in which N.C.G.S. § 6-21.2 is couched, the circumstances surrounding its enactment, and the subsequent decisions construing the relevant statutory language provides no support for defendant's contention that N.C.G.S. § 6-21.2 does not apply outside the context of a commercial agreement. As we noted in *Stillwell*, "[t]he statute, being remedial, 'should be construed liberally to accomplish the purpose of the Legislature and to bring within it all cases fairly falling within its intended scope.' " 300 N.C. at 293 (quoting *Hicks v. Albertson*, 284 N.C. 236, 239 (1973)). For that reason, this Court has previously rejected any contention that N.C.G.S. § 6-21.2 should be construed narrowly. Moreover, while our opinion in *Stillwell* did indicate that the "legislative history [of N.C.G.S. § 6-21.2] demonstrate[d] that it was intended to supplement those principles of law generally applicable to commercial transactions," we did not hold that the relevant statutory language only applied in the context of a commercial transaction, note that *Stillwell* expressly rejected such a limited reading of the relevant statutory language, and reiterate that this Court described N.C.G.S. § 6-21.2 as having been "enacted to amend certain provisions of the State's Uniform Commercial Code 'and other related statutes.' " *Id.* at 293 (quoting Chapter 562 of the 1967 Session Laws). As a result, *Stillwell* reflects a much more expansive interpretation of the relevant statutory language, pursuant to which "the term 'evidence of indebtedness' as used in [N.C.]G.S. [§] 6-21.2 has reference to any printed or written instrument, signed or otherwise executed by the obligor(s), which evidences on its face a legally enforceable obligation to pay money," *id.* at 294, than that advocated for by defendant.

¶ 25 As we have already noted, defendant has directed our attention to *Forsyth Mun. Alcoholic Beverage Control Bd. v. Folds*, 117 N.C. App. 232, 238 (1994), which she describes as holding that attorney's fees awards are not available in actions arising from the breach of a contract for the sale of real property. In that case, the Court of Appeals stated that:

> As a general rule contractual provisions for attorney's fees are invalid in the absence of statutory authority. This is a principle that has long been settled in North Carolina and fully reviewed by our Supreme Court in *Stillwell* . . . .
>
> This Court has recently enunciated an exception to that principle in the case of separation agreements in particular, *Edwards v. Edwards*, 102 N.C. App. 706, 403 S.E.2d 530, *cert. denied* 329 N.C. 787, 408 S.E.2d 518 (1991); *Bromhal v. Stott*, 116 N.C. App. 250, 447

> S.E.2d 481 (1994) (Greene, J. dissenting in part), and indeed in the case of settlement agreements in general. *Carter v. Foster*, 103 N.C. App. 110, 404 S.E.2d 484 (1991).
>
> Nevertheless, we know of no basis in North Carolina law for the allowance of attorney's fees in a dispute arising out of a contract for the sale of real property, as is involved in this case. Therefore, on the basis of those well-settled principles, we reverse the judgment of the trial court insofar as it allowed attorney's fees to the plaintiffs . . . .

Id. at 238. In addition, defendant relies upon *Calhoun v. WHA Med. Clinic, PLLC*, 178 N.C. App. 585, 604 (2006), in which the Court of Appeals attempted to determine whether N.C.G.S. § 6-21.2 allowed for the collection of attorney's fees in an action relating to the breach of an employer-employee agreement. As a result of the fact that the trial court had "made no findings of fact [as to] whether the contract at issue [wa]s a 'printed or written instrument, signed or otherwise executed by the obligor(s), which evidences on its face a legally enforceable obligation to pay money' or whether this contract relates to commercial transactions" as required by *Stillwell*, the Court of Appeals remanded that case to the trial court for further findings of fact. *Id.* at 604–05. In view of the fact that neither of these decisions purports to alter the definition of an "evidence of indebtedness" set out in *Stillwell* or addresses claims for the recovery of specific fees of the sort that are at issue in this case, neither of them supports defendant's argument that N.C.G.S. § 6-21.2 has no application outside the context of a commercial agreement.[3]

¶ 26 Defendant's other arguments concerning the applicability of N.C.G.S. § 6-21.2 to the circumstances at issue in this case are equally unavailing. Although plaintiff attempted to recover the due diligence fee in her

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3. As an aside, we note that nothing in either the relevant statutory language or in *Stillwell* suggests that any sort of transaction or category of transactions is categorically excluded from the definition of an "evidence of indebtedness" for which an award of attorney's fees is authorized pursuant to N.C.G.S. § 6-21.2. Instead, the test for determining whether a particular instrument is or is not an "evidence of indebtedness" is the more generic one set out in *Stillwell*. Similarly, we note that *Stillwell* involved a contract for a lease of equipment, which does not fall within the category of "notes, securities, mortgages, [or] deeds of trust." *See also Four Seasons Homeowners Ass'n, Inc. v. Sellers*, 72 N.C. App. 189, 192 (1984) (holding that a "Declaration of Covenants, Conditions and Restrictions" signed by homeowners in a subdivision was an "evidence of indebtedness" pursuant to N.C.G.S. § 6-21.2); *Crist v. Crist*, 145 N.C. App. 418 (2001) (holding that a note provided in the context of a domestic relations dispute was subject to N.C.G.S. § 6-21.2).

initial small claims action, she restated her pleadings on appeal to assert a claim for the earnest money deposit as well. As a result, this action clearly involves a "legal proceeding[ ] . . . brought by Buyer or Seller against the other to recover the Earnest Money Deposit" in which plaintiff is authorized to seek and obtain an award of attorney's fees.

¶ 27 Moreover, as plaintiff notes, defendant's contentions relating to the identity of the party to whom the earnest money deposit was due, the "maturity" of plaintiff's claim for the earnest money deposit, and the absence of notice were not mentioned in either of the opinions filed at the Court of Appeals and are not properly before the Court for that reason. In addition, none of those arguments have any substantive merit. Although the Offer to Purchase and Contract did provide that the earnest money deposit should be made "payable and delivered to Escrow Agent," defendant's failure to make the required payment to the escrow agent constituted a breach of contract sufficient to trigger plaintiff's right to recover the earnest fee deposit from defendant as liquidated damages. The same provision of the contract defeats defendant's contention that plaintiff's right to recover the amount of the earnest money deposit had not yet "matured." Finally, defendant is not entitled to any relief from the trial court's attorney's fees award based upon an alleged lack of notice given that defendant continued to participate in the litigation of this case before the trial court without objecting on the basis of an alleged lack of notice after having been informed in the amended complaint that plaintiff sought to obtain an award of attorney's fees from defendant.

¶ 28 Finally, we hold that the trial court did not err in awarding $13,067.70 in attorney's fees to plaintiff given that the relevant fees were incurred in the course of defending the judgment that plaintiff had initially received from the magistrate. In *City Fin. Co. of Goldsboro*, 86 N.C. App. at 449, the Court of Appeals held that the trial court had erred by refusing to award additional attorney's fees that the defendants had incurred while defending a judgment that they had obtained in an action brought pursuant to N.C.G.S. § 75-1.1 from a motion for relief from judgment pursuant to N.C.G.S. § 1A-1, Rule 60, on the theory that, "[u]pon a finding that defendants were entitled to attorney's fees in obtaining their judgment, any effort by defendants to protect that judgment should likewise entitle them to attorney's fees." In reaching this conclusion, the Court of Appeals noted that this Court had previously upheld an award of attorney's fees pursuant to N.C.G.S. § 6-21.1(a) on the theory that

> [t]he obvious purpose of this statute is to provide relief for a person who has sustained injury or property

> damage in an amount so small that, if he must pay his attorney out of his recovery, he may well conclude that [it] is not economically feasible to bring suit on his claim. In such a situation the Legislature apparently concluded that the defendant, though at fault, would have an unjustly superior bargaining power in settlement negotiations. . . . This statute, being remedial, should be construed liberally to accomplish the purpose of the Legislature and to bring within it all cases fairly falling within its intended scope.

City Fin. Co. of Goldsboro, 86 N.C. App. at 449–50 (second and third alterations in original) (quoting *Hicks v. Albertson*, 284 N.C. 236, 239 (1973)); *see also Gray v. N.C. Ins. Underwriting Ass'n*, 352 N.C. 61, 76 (2000) (allowing the consideration of a request for an award of attorney's fees on remand in reliance upon *City Fin. Co. of Goldsboro*); *Eley v. Mid/East Acceptance Corp. of N.C., Inc.*, 171 N.C. App. 368 (2005); *Garlock v. Henson*, 112 N.C. App. 243, 247 (1993). Similarly, in this case, it "would not have been economically feasible," *id.* at 450, for plaintiff to continue to defend the judgment that she had obtained before the magistrate if the trial court lacked the authority to award attorney's fees in connection with the proceedings before the district court, with a contrary determination necessarily placing plaintiff in the position of either incurring legal fees in excess of the judgment amount in order to defend it or abandoning her attempts to seek relief based upon defendant's breaches of contract. As a result, in light of the general principle enunciated by the Court of Appeals in *City Fin. Co. of Goldsboro* and upheld by this Court in *Gray*, the trial court did not err by awarding plaintiff $13,067.70 in attorney's fees in this case.

¶ 29 A careful review of the record demonstrates that defendant owed plaintiff the due diligence fee, the amount of the earnest money deposit, and attorney's fees incurred during the legal proceedings undertaken to recover those fees. In view of the fact that these terms are clear and unambiguous and the fact that the parties agreed to them, we are unable to discern any reason for concluding that the Offer to Purchase and Contract does not constitute a written "obligation to pay money" or an "evidence of indebtedness" pursuant to N.C.G.S. § 6-21.2. In addition, we are unable to see why the limitation upon the amount of attorney's fees set out in N.C.G.S. § 6-21.2 should hinder plaintiff's ability to recoup attorney's fees incurred in defense of the judgment that she obtained before the magistrate. As a result, for all of these reasons, the decision of the Court of Appeals is affirmed.

AFFIRMED.

Justice BERGER dissenting.

¶ 30 The Court's approach today marks a significant change in the jurisprudence of our State. Because the majority has turned away from the principle that "the non-allowance of counsel fees has prevailed as the policy of this state at least since 1879," *Stillwell Enters., Inc. v. Interstate Equip. Co.*, 300 N.C. 286, 289, 266 S.E.2d 812, 814 (1980), I respectfully dissent.

¶ 31 This Court previously stated that "[a]lthough [N.C.]G.S. [§] 6-21.2 was not itself codified as a constituent section of Chapter 25 of the General Statutes (the Uniform Commercial Code [or UCC]), we believe its legislative history clearly demonstrates that it was intended to supplement those principles of law generally applicable to commercial transactions." *Id.* at 293, 266 S.E.2d at 817. Relying on *Stillwell*, the Court of Appeals has held that there is "no basis in North Carolina law for the allowance of attorney's fees in a dispute arising out of a contract for the sale of real property." *Forsyth Mun. Alcoholic Beverage Control Bd. v. Folds*, 117 N.C. App. 232, 238, 450 S.E.2d 498, 502 (1994). Thus, N.C.G.S. § 6-21.2 is not applicable to this case and recovery of attorney's fees is not permitted by the statute.

¶ 32 Even assuming that recovery of attorney's fees was allowable here, subsection 6-21.2(2) sets forth a specific formula to be used in calculating allowable attorney's fees absent such a formula or designation in the contract, as is the case here. Because no such formula is stated in the contract, the statutory formula must be used in calculating attorney's fees. The majority today expands the application of section 6-21.2 beyond what this Court has previously determined to be the intent of the legislature by failing to utilize the calculation method expressly called for in the statute.

¶ 33 "[T]he jurisprudence of North Carolina traditionally has frowned upon contractual obligations for attorney's fees as part of the costs of an action." *Stillwell*, 300 N.C. at 289, 266 S.E.2d at 814 (quoting *Supply, Inc. v. Allen*, 30 N.C. App. 272, 276, 227 S.E.2d 120, 123 (1976)). The rule has "long obtained" that attorney's fees are not awarded "unless such a recovery is expressly authorized by statute[,] . . . [e]ven in the face of a carefully drafted contractual provision indemnifying a party for such attorneys' fees." *Id.* at 289, 266 S.E.2d at 814–15 (citation omitted); *see also Baxter v. Jones*, 283 N.C. 327, 330, 196 S.E.2d 193, 196 (1973) ("Except as so provided by statute, attorneys' fees are not allowable.").

In other words, a statute must expressly allow for recovery of attorney's fees before a court can order payment of the same.

¶ 34 Section 6-21.2 allows for recovery of reasonable attorney's fees for collection "upon any note, conditional sale contract or other evidence of indebtedness." N.C.G.S. § 6-21.2 (2021). When applying N.C.G.S. § 6-21.2, we have instructed that the statute " 'should be construed liberally to accomplish the purpose of the Legislature and to bring within it all cases fairly falling within its intended scope.' " *Stillwell*, 300 N.C. at 293, 266 S.E.2d at 817 (quoting *Hicks v. Albertson*, 284 N.C. 236, 239, 200 S.E.2d 40, 42 (1972)).

¶ 35 The majority contends that "*Stillwell* reflects a much more expansive interpretation of the relevant statutory language" to include any written "evidence of indebtedness." This interpretation would allow collection of attorney's fees for any case in which there is written evidence of a legally enforceable debt. This determination runs counter to this Court's stated goal in *Stillwell* to interpret the statute based on the legislature's purpose in enacting the law and its subsequent determination that the statute's purpose was to supplement laws intended to govern commercial transactions.

¶ 36 The term "evidence of indebtedness" is used throughout the General Statutes of North Carolina to refer to notes, securities, mortgages, deeds of trust, and similar written documents.[1] *See*, *e.g.*, N.C.G.S. § 25-9-109(d)(14) (2021); N.C.G.S. § 45-36.3(a) (2021); N.C.G.S. § 47-20(d) (2021); N.C.G.S. § 53-232.10(a) (2021); N.C.G.S. § 54B-244(b)(3)(h) (2021); N.C.G.S. § 58-7-173(1), (6)–(7) (2021); N.C.G.S. § 78A-2(11) (2021); N.C.G.S. § 115C-413 (2021); N.C.G.S. § 122D-3(4) (2021). The residential sales

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1. The majority appears to quote this language in footnote 3 to support its expansive reading. However, the majority omits "or similar documents" from the quoted language. This omission is meaningful because a lease of equipment is a "similar document." For example, in a mortgage, title remains with the seller while the buyer makes installment payments until the debt is paid off. While not exactly the same, a lease contemplates an ongoing debt relationship in which an owner of property retains title while the terms of the lease are satisfied. In addition, a lease is also similar to the definition of a conditional sales contract, which is defined as "[a] contract for the sale of goods under which the buyer makes periodic payments and the seller retains title to or a security interest in the goods." *Retail Installment Contract*, *Black's Law Dictionary* (11th ed. 2019); (the definition of conditional sales contract in *Black's* says *see Retail Installment Contract*); *see also North Carolina Estate Settlement Practice Guide* § 18:5 (2013).

At any rate, while the lease in *Stillwell* is similar to a mortgage or a conditional sales contract, it is clearly distinguishable from a residential real estate contract like the one at issue in this case because a residential real estate contract does not on its face contemplate an ongoing debt relationship between the buyer and seller and does not provide for installment payments or one party retaining title to the property.

contract here is far different from the written evidence of indebtedness contemplated by the statute.

¶ 37 Furthermore, the majority's reading of *Stillwell* as an "expansive interpretation" of section 6-21.2 goes against North Carolina's history of barring the recovery of attorney's fees unless expressly authorized by the legislature. Because this Court previously determined that the legislature intended section 6-21.2 to apply solely to commercial transactions under the UCC, it should not be applied to a private sale of real property. Our inquiry should end there.

¶ 38 However, even if we assume that section 6-21.2 applies, the majority disregards the statutory formula set forth therein concerning the calculation of attorney's fees. Subsection (2) of this statute, expressly provides that

> [i]f such note, conditional sale contract or other evidence of indebtedness provides for the payment of reasonable attorneys' fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the "outstanding balance" owing on said note, contract or other evidence of indebtedness.

N.C.G.S. § 6-21.2(2).

¶ 39 The contract at issue states that if legal proceedings are brought "to recover the Earnest Money Deposit, the prevailing party in the proceeding shall be entitled to recover . . . reasonable attorney fees." If section 6-21.2 applies here, as the majority holds, the 15% limitation on recovery is applicable because the contract gives no specific formula for calculating attorney's fees. The statute does not provide any alternative calculation method.

¶ 40 Instead, the trial court based the amount granted for attorney's fees in this case, $13,067.70, on an attorney's affidavit of fees incurred. The majority justifies this amount based on a single Court of Appeals decision to award attorney's fees based on the attorney's time spent on an appeal in order to make it "economically feasible" to defend a judgment. *See City Fin. Co. of Goldsboro v. Boykin*, 86 N.C. App. 446, 450, 358 S.E.2d 83, 85 (1987).

¶ 41 The legislature has never authorized payment of attorney's fees based on an attorney's time spent on a case. Furthermore, the statute at issue in *City Fin. Co. of Goldsboro*, N.C.G.S. § 75-16.1, is similar to N.C.G.S. § 6-21.1, which differs significantly from the statute at issue

here. Section 6-21.1 provides no formula for attorney's fees to be awarded and only applies to recovery of attorney's fees in suits for personal injury, suits for property damage, or suits against insurance companies; none of which are at issue today.

¶ 42 The statute at issue today is clear: to determine the proper amount for attorney's fees we simply ascertain the outstanding balance of the contract and award fifteen percent of that amount. N.C.G.S. § 6-21.2(2). Here, the contract designates that "[i]n the event of breach of this Contract by Buyer, the Earnest Money Deposit shall be paid to Seller as liquidated damages and as Seller's sole and exclusive remedy for such breach." It further states that this amount "is compensatory and not punitive, [with] such amount being a reasonable estimation of the actual loss that Seller would incur as a result of such breach." This provision clarifies that it does not preclude the seller from the right to retain the due diligence fee, which a separate section designates as $2,000, but it also expressly states that the award of attorney's fees is "to recover the Earnest Money Deposit." Thus, the contract ties the recovery of attorney's fees directly and exclusively to the earnest money deposit.

¶ 43 Having determined that section 6-21.2 applies, subsection (2) calls for recovery of attorney's fees based on a percentage of the outstanding balance. The contractual provision at issue expressly ties attorney's fees to the earnest money deposit. Therefore, the proper calculation of attorney's fees would be: $2,500 (earnest money deposit) x 15% (statutory rate) = $375 (in attorney's fees). There is no basis for an award of $13,067.70 under any statute, and such a large award would appear to incentivize costly litigation.

¶ 44 Ultimately, the majority's decision to allow the collection of attorney's fees in any case involving written evidence of a debt, and to allow the collection of any amount of attorney's fees spent defending such a judgment, including on appeal, are policy decisions that have no statutory basis. "The General Assembly is the 'policy-making agency [of this State]' because it is a far more appropriate forum than the courts for implementing policy-based changes to our laws." *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169, 594 S.E.2d 1, 8 (2004). Regardless of whether these changes may be perceived as beneficial for litigants, the justice system, or this State, they have no basis in our General Statutes, and any such a policy shift should be undertaken by the legislature, not this Court.

Justice BARRINGER joins in this dissenting opinion.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION, ATTORNEY GENERAL JOSHUA H. STEIN, PUBLIC STAFF – NORTH CAROLINA UTILITIES COMMISSION
v.
VIRGINIA ELECTRIC AND POWER COMPANY D/B/A DOMINION ENERGY NORTH CAROLINA

No. 477A20

Filed 17 June 2022

Utilities—general rate case—treatment of coal ash remediation costs—departure from prior precedent—not arbitrary and capricious—no equal protection violation

In a general rate case, the Utilities Commission neither acted arbitrarily and capriciously nor violated the equal protection provisions of the state and federal constitutions by authorizing a utilities company to amortize its coal ash waste remediation costs over a ten-year period instead of the five-year period it allowed in two earlier decisions—one from 2016 involving the same company and another involving Duke Energy Corporation—and by denying the company the ability to earn a return on the unamortized balance of those costs as it had permitted in the earlier decisions. The Commission's ratemaking decisions—which are legislative, rather than judicial, in nature—are not subject to res judicata or stare decisis principles. Further, the 2016 order expressly disclaimed having any precedential effect regarding the company's coal ash-related issues; the decision from the Duke rate cases was still on appeal when this case was heard, was reversed on appeal, and resulted in an unfavorable settlement for Duke; and the Commission's order in this case was supported by the record and adequately explained the Commission's basis for its decision.

Justice BARRINGER dissenting.

Chief Justice NEWBY and Justice BERGER join in this dissenting opinion.

Appeal as of right pursuant to N.C.G.S. § 62-90 and N.C.G.S. § 7A-29(b) from a final order of the North Carolina Utilities Commission entered on 24 February 2020 in Docket No. E-22, Sub 562 and 566. Heard in the Supreme Court on 5 January 2022.

Public Staff – North Carolina Utilities Commission, *by Chief Counsel Diane W. Downey and Staff Attorneys Lucy E. Edmondson*, *Nadia L. Luhr*, *Robert B. Josey*, *and Munashe Magarira*, *for North Carolina Utilities Commission*, *and Joshua H. Stein*, *Attorney General*, *by Margaret A. Force*, *Special Deputy Attorney General*, *appellees.*

McGuire Woods, *LLP*, *by Mary Lynne Grigg*, *Mark E. Anderson*, *W. Dixon Snukals*, *Nicholas A. Dantonio*, *and Bradley R. Kutrow*, *for Virginia Electric and Power Company d/b/a Dominion Energy North Carolina*, *appellant.*

ERVIN, Justice.

¶ 1 This appeal arises from an order entered by the Commission addressing an application for a general increase in its North Carolina retail rates filed by Virginia Electric and Power Company d/b/a Dominion Energy North Carolina. In its order, the Commission authorized Dominion to calculate its North Carolina retail electric rates by, among other things, amortizing certain costs associated with the storage, disposal, and removal of coal ash waste to rates over a ten-year period while rejecting Dominion's request to be permitted to earn a return on the unamortized balance of those costs. In seeking relief from the Commission's order before this Court, Dominion argues that the Commission acted arbitrarily and capriciously by failing to utilize the same amortization period that had been employed in two earlier decisions involving Dominion and Duke Energy Corporation addressing the ratemaking implications of coal ash-related costs and by failing to allow Dominion to earn a return on the unamortized balance of those costs as had been permitted in the earlier decisions. More specifically, Dominion argues that the Commission erred by "fail[ing] to set forth *any* facts to support its break with its own precedent," that "[a]ny differences that exist between [Dominion] and Duke Energy warrant more favorable ratemaking treatment for" Dominion in this case, and that the Commission's failure to follow the precedent that had been established in its earlier coal ash-related decisions violated the equal protection provisions of the United States and North Carolina Constitutions. After careful consideration of Dominion's challenges to the Commission's order in light of the record and the applicable law, we affirm the Commission's order.

I. Factual Background

A. Substantive Facts

¶ 2 The application that Dominion filed with the Commission in this case sought an increase in the company's North Carolina retail rates and charges, with the costs upon which Dominion's application was predicated having included substantial amounts that Dominion had incurred in order to remediate conditions at the company's coal ash storage facilities between 1 July 2016 and 30 June 2019,[1] which included the costs of complying with both federal and state regulatory requirements that mandated the closure of existing coal ash basins and other storage areas. Among other regulations, certain Dominion facilities are subject to the "Hazardous and Solid Waste Management System—Disposal of Coal Combustion Residuals from Electric Utilities" rule, 80 Fed. Reg. 21301, or "CCR Rule," which was promulgated by the Environmental Protection Agency on 17 April 2015. According to the CCR rule, affected utilities are required to retrofit or close all of their existing coal ash ponds and to perform groundwater monitoring, engage in various sorts of corrective action, and take other steps, as necessary, to prevent the harmful substances found in coal combustion residuals from percolating into nearby groundwater. Eight of Dominion's coal-fired generating facilities and related coal ash storage facilities are subject to the CCR rule.

¶ 3 Another coal ash-related regulatory requirement that affects Dominion's operations is Virginia Senate Bill 1355, which was adopted in 2019 and requires Dominion to remove coal combustion residuals from the storage ponds used at four of Dominion's coal-fired electric generating facilities and to place them into lined, permitted landfills, with the excavated coal ash waste to be permanently housed either in fully-lined onsite landfills that have been constructed consistently with modern standards or in offsite landfills and with Dominion being required to recycle approximately 25% of excavated coal ash waste in the event that it is economically feasible to do so. In order to satisfy the requirements of the CCR Rule and other applicable state and federal laws, Dominion developed closure plans for each of the ponds and landfills to which these regulations applied. As a result, Dominion incurred a North Carolina retail amount of $21.8 million for the purpose of managing its coal ash waste during the three year period from 1 July 2016 until 30 June 2019,

1. Coal ash, or coal combustion residuals (CCR), is the by-product generated when coal is burned for the purpose of generating electricity. Historically, coal combustion residuals have been stored either in wet pond impoundments or in dry landfills.

including "(1) $19.2 million in expenditures made . . . to comply with federal and state environmental regulations associated with managing CCRs and converting or closing waste ash management facilities at seven of [Dominion]'s generation stations; and (2) $2.7 million in financing costs."

B. Prior Commission Decisions Relating to Coal Ash Remediation

¶ 4 On 31 March 2016, Dominion applied to the Commission for a general rate increase for the purpose, in part, of reflecting coal ash-related costs that it had incurred through 30 June 2016 in its North Carolina retail rates and charges. *Application of Va. Elec. & Power Co., d/b/a Dominion N.C. Power, for Adjustment of Rates and Charges Applicable to Elec. Util. Serv. in N.C.*, Docket No. E-22, Sub 532, 2016 N.C. PUC LEXIS 1183, at *4-5 (N.C.U.C. Dec. 22, 2016). Subsequent to the filing of Dominion's application, the Public Staff and Dominion entered into a stipulation that provided, with respect to Dominion's coal ash-related costs, that:

> (1) Amortization periods — CCR expenditures incurred through June 30, 2016, should be amortized over a five-year period. Notwithstanding this agreement, the Stipulating Parties further agree that the appropriate amortization period for future CCR expenditures shall be determined on a case-by-case basis.
>
> (2) Deferral of future CCR expenditures — By virtue of the Commission's approval in this proceeding of a mechanism to provide for recovery of CCR expenditures incurred through June 30, 2016, the Company has authority pursuant to the August 6, 2004, Order in Docket No. E-22, Sub 420, to defer additional CCR expenditures, without prejudice to the right of any party to take issue with the amount or the treatment of any deferral of ARO costs in a rate case or other appropriate proceeding.
>
> (3) Continuing amortization and deferral of CCR expenditures — The Company and the Public Staff reserve their rights in the Company's next general rate case to argue to the Commission (a) how the unamortized balance of deferred CCR expenditures incurred by the Company prior to June 30, 2016, and the related amortization expense should be

> addressed; and (b) how reasonable and prudent CCR expenditures incurred by the Company after June 30, 2016, should be recovered in rates.
>
> (4) Overall prudence of CCR Plan — The Public Staff's agreement in this proceeding to the deferral and amortization of CCR expenditures incurred through June 30, 2016, shall not be construed as a recommendation that the Commission reach any conclusions regarding the prudence and reasonableness of the Company's overall CCR plan, or regarding any specific expenditures other than the ones to be recovered in this case.

Id. at *137-39. After the conclusion of an evidentiary hearing, the Commission approved the portion of the parties' stipulation relating to coal ash-related costs, determining that Dominion was

> allowed to defer the costs of its remediation of coal combustion residuals through June 30, 2016, and shall be allowed to amortize those deferred costs over a period of five years. The Company submitted substantial evidence that its costs incurred to comply with federal and state law regarding disposal of CCRs were prudently and reasonably incurred. . . . However, the Commission's approval of [Dominion]'s CCR cost deferral is based on the particular facts and circumstances presented in this docket and, therefore, is not precedent for the treatment of CCR costs in any future proceedings.
>
> In addition, the Commission finds and concludes that the treatment of CCR costs incurred by [Dominion] after June 30, 2016, shall be reviewed in a future rate case, subject to the provisions of the Stipulation regarding future amortization periods, deferral of future CCR expenditures, continuing amortization and deferral of CCR expenditures, and any other arguments or positions presented by the Company, the Public Staff, or another party at that time. Further, the Commission's determination in this case shall not be construed as determining the prudence and reasonableness of the Company's overall CCR plan, or the prudence and reasonableness of any specific CCR

> expenditures other than the ones deferred and authorized to be recovered in this case.

Id. at *152-53. Based upon these findings, the Commission approved the stipulation between Dominion and the Public Staff "in its entirety," so that Dominion was allowed to amortize the coal ash-related costs that it had incurred prior to 30 June 2016 over a period of five years and to earn a return on the unamortized balance. *Id.* at *374.

¶ 5 On 1 June 2017, Duke Energy Progress filed an application for a general rate increase that included, among other things, a request to account for certain coal ash-related remediation costs in the calculation of its North Carolina retail rates and charges. *State ex rel. Utils. Comm'n v. Stein*, 375 N.C. 870, 880 (2020). Similarly, on 25 August 2017, Duke Energy Carolinas filed an application with the Commission seeking a general rate increase that reflected certain costs relating to the closure of coal ash basins and other coal ash-related compliance costs in the calculation of its North Carolina retail rates and charges. *Id.* at 880–81. The Public Staff, the Attorney General, the Sierra Club, and several other parties intervened in these proceedings for the purpose of arguing that the Commission should not allow Duke to include some or all of these coal ash-related costs in the calculation of its North Carolina retail rates and charges, *id.* at 881, in light of Duke's alleged mismanagement of its coal ash basins, with the Public Staff having urged the Commission to adopt an "equitable sharing" plan that would have resulted in a 50-50 sharing of these costs between Duke's shareholders and ratepayers. *Application by Duke Energy Progress, LLC, for Adjustment of Rates and Charges Applicable to Elec. Util. Serv. in N.C.; Application by Duke Energy Carolinas, LLC, for Adjustment of Rates and Charges Applicable to Elec. Util. Serv. in N.C.*, 2021 N.C. PUC LEXIS 723, *1 (N.C.U.C. June 25, 2021). After conducting an evidentiary hearing, the Commission entered orders allowing Duke Energy Progress and Duke Energy Carolinas to amortize the coal ash-related costs that they had accumulated between 2015 and 2017 over a five-year period, and to earn a return on the unamortized balance of these costs. *Id.* at *1–2. On the other hand, the Commission imposed a $30 million mismanagement penalty on Duke Energy Progress and a $70 million mismanagement penalty on Duke Energy Carolinas as a result of the manner in which the companies had handled their coal combustion residuals. *Id.* at *2.

¶ 6 After the entry of these orders, the Attorney General, the Public Staff, and the Sierra Club sought relief from the Commission's orders before this Court. *Stein*, 375 N.C. 870. As is discussed in more detail below, this Court determined in *Stein* that the Commission had the authority

to allow Duke Energy to amortize coal ash-related costs in its North Carolina retail rates and charges and to allow the recovery of a return on the unamortized balance of those costs pursuant to N.C.G.S. § 62-133(d) given that the enactment of the CCR Rule and other state laws regulating coal ash storage and disposal had "forced [Duke Energy] to confront an 'extraordinary and unprecedented' issue involving the potential expenditure of billions of dollars in order to address a significant environmental problem." *Id.* at 926. On the other hand, this Court also found that the Commission was "required to consider all material facts of record" in the course of exercising its authority to consider "other facts" pursuant to N.C.G.S. § 62-133(d), that the Commission had failed to consider certain facts "pertaining to alleged environmental violations," and that both cases should be remanded to the Commission for the purpose of reconsidering the Public Staff's "equitable sharing" proposal in light of a correct understanding of the applicable law. *Id.* at 931–33.

¶ 7 After this Court's decision in *Stein*, Duke Energy entered into a settlement agreement with the Public Staff, the Attorney General, and the Sierra Club, 2021 N.C. PUC LEXIS 723, *10, for the purpose of "resolv[ing] not only the 2017 rate cases on remand from the Court but also the 2019 rate cases and future CCR costs to be incurred through" 2030 for both Duke Energy Progress and Duke Energy Carolinas. *Id.* at *27. In this settlement, Duke agreed to a significant reduction in the amount of coal ash-related costs that were to be included in the calculation of the companies' rates, with "the net present value of the savings to [ratepayers] from forgone CCR cost recovery (including applicable financing costs) [having] amount[ed] to more than $900 million," *id.* at *29, including a $261,000,000 reduction in the amount of coal ash-related costs included in Duke Energy Progress' North Carolina retail rates, a $224,000,000 reduction in the amount of coal ash-related costs included in Duke Energy Carolina's North Carolina retail rates, "future reduced recovery of CCR costs through . . . 2030 of $162 million [for Duke Energy Progress] and $108 million [for Duke Energy Carolinas], and other additional customer-savings provisions." *Id.* at *30. On 25 June 2021, the Commission entered an order approving the proposed coal ash cost-related settlement. *Id.* at *37.

C. Procedural History of the Current Dominion Rate Case

¶ 8 On 27 February 2019, Dominion filed a Notice of Intent to File a General Rate Application with the Commission in Docket No. E-22, Sub 562. On 29 March 2019, Dominion filed an application with the Commission for the purpose of seeking a $26,958,000 increase in its North Carolina retail rates and charges. On 17 September 2019, Dominion

and the Public Staff entered into a stipulation resolving all of the matters at issue in this case with the exception of "issues associated with coal combustion residuals (CCR) costs." The Commission conducted an evidentiary hearing for the purpose of resolving the issues that remained in dispute between the parties.

¶ 9 In the course of a hearing held before the Commission for the purpose of receiving expert witness testimony on 23 September 2019, Jason E. Williams testified on behalf of Dominion that the Company had "historically managed CCR consistently with evolving industry standards and regulatory requirements"; that, by 1988, 80% of the coal ash generated at Dominion's coal-fired generating facilities was stored in surface impoundments or landfills; and that the actions that the Company had taken "to comply with the federal and state requirements have been reasonable and prudent." Jay Lucas, on the other hand, testified for the Public Staff for the purpose of describing its "equitable sharing recommendation," pursuant to which Dominion shareholders would be required to cover 40% of the relevant coal ash costs while the remaining 60% would be included in calculating Dominion's North Carolina retail rates.

¶ 10 According to Mr. Lucas, while the Public Staff's equitable sharing plan was not predicated upon the use of a prudence standard, pursuant to which 100% of the company's coal ash-related costs would have been disallowed, at least in his opinion, the agency's proposal made sense in light of the magnitude and nature of Dominion's coal ash remediation costs and the extent of Dominion's culpability for the resulting environmental contamination given the company's "fail[ure] to improve its CCR management practices despite the evolving knowledge of the risk of unlined CCR storage at the time," which indicated that "wet storage of CCR in unlined surface impoundments was detrimental to the quality of surrounding groundwater and surface water." Mr. Lucas described multiple known exceedances of the applicable groundwater contaminant limits at several of Dominion's coal ash sites, including an exceedance at the company's Possum Point facility in the 1980s; elevated trace metal levels in the groundwater, surface water, and soil surrounding the Chisman Creek facility; and 548 instances of groundwater exceedances which resulted from Dominion's failure to prevent the leaching of coal combustion residuals from its surface impoundments. In addition, Mr. Lucas described six different instances in which environmental groups, local government entities, and property owners had initiated legal proceedings against Dominion as the result of pollution stemming from the leaching of coal ash contaminants, including arsenic, into surface

waters from wet impoundments. When asked why the Public Staff's proposed "equitable sharing" plan in this case was more favorable to Dominion than the plan that the Public Staff had proposed in the 2017 Duke Energy rate cases, Mr. Lucas responded that Dominion had "not been found guilty of criminal negligence with respect to its management of waste coal ash facilities" and that there was "less evidence" of harmful environmental impacts than had been the case with respect to Duke Energy's facilities.

¶ 11 In the same vein, Public Staff witness Michael C. Maness defended the Public Staff's "equitable sharing" proposal on the grounds that:

> [t]he total amount of the costs is large (approximately $377 million on a system level and approximately $22 million on a North Carolina retail level), which amounts to approximately $179 per North Carolina retail customer, or $60 per year per North Carolina retail customer, before considering the impact of including the unamortized amount in rate base.
>
> [Dominion] will be incurring significant additional costs in the future related to the CCR Excavation Act (Virginia Senate Bill 1355).
>
> The incurrence of these costs will not provide any benefits to customers in terms of additional electric service or improvements to service.
>
> The incurrence of CCR costs has not been the result of economic analysis that pointed toward an action that would be economically advantageous to ratepayers.
>
> . . . [T]he Commission has implemented equitable sharing in several past circumstances involving incurred costs that did not provide any future benefits to retail customers.

According to Mr. Maness, the Public Staff's proposal that ratepayers bear 60% of the costs and that shareholders bear 40% of the costs was appropriate in light of the manner in which Dominion had managed its coal combustion residuals and the nature and magnitude of the resulting costs and that the resulting "equitable sharing" could be achieved by precluding Dominion from earning a return on the unamortized balance of its coal ash-related costs and by amortizing the costs over an eighteen-year period, with it being likely that "the Public Staff would . . .

recommend some level of sharing even in the absence of environmental culpability, due to the magnitude and/or nature of the costs."

¶ 12 In rebuttal, Mr. Williams denied that Dominion had failed to properly manage its coal combustion residuals, asserting that "the Public Staff has acknowledged that it is not capable of or willing to identify a specific action the Company could have taken in the past," that "neither the Company nor the Public Staff could find any example prior to 2016 where the Public Staff had raised any concerns regarding groundwater or surface water issues," and that the Public Staff should refrain from acting as an environmental regulator in the course of judging the prudence of the Company's past actions. Based upon this logic, Mr. Williams concluded that the Public Staff's proposal to disallow admittedly prudent and reasonable costs on the basis of "equitable sharing" was "shortsighted and could lead to an unpredictable and unhealthy regulatory environment for utilities and their customers."

¶ 13 On 24 February 2020, the Commission entered an order in which it found as fact that:

> **Recovery of CCR Costs**
>
> 49. Since its last rate case, on a North Carolina retail jurisdictional basis, from the period beginning July 1, 2016 and running through June 30, 2019 (the Deferral Period), [Dominion] has incurred $21.8 million in costs associated with the management of CCRs (the CCR Costs). The $21.8 million includes: (1) $19.2 million in expenditures made during the Deferral Period to comply with federal and state environmental regulations associated with managing CCRs and converting or closing waste ash management facilities at seven of [Dominion]'s generation stations; and (2) $2.7 million in financing costs incurred during the Deferral Period.
>
> 50. The record includes substantial evidence that, particularly where CCRs were being managed in lined landfills, the CCR Costs incurred during the Deferral Period were prudently incurred.
>
> 51. Although the Public Staff offered evidence challenging the manner in which [Dominion] had managed CCRs and its various CCR waste management facilities over several decades, insofar as the

> specific CCR Costs incurred during the Deferral Period are concerned, while the record contains evidence that identifies instances of imprudence, the record contains insufficient evidence to permit the Commission to quantify the effects of imprudent actions on ratepayers.
>
> 52. [Dominion] is entitled to recover the CCR Costs established in this general rate case, in the manner and subject to the conditions as set forth herein.

In addition, the Commission noted that the order that it had entered in connection with the Company's 2016 rate case did "not have precedential value with respect to the CCR issues in this case" because the stipulation between Dominion and the Public Staff that had been approved in that proceeding provided that:

> [t]he Public Staff's agreement in this proceeding to the deferral and amortization of CCR expenditures incurred through June 30, 2016, shall not be construed as a recommendation that the Commission reach any conclusions regarding the prudence and reasonableness of the Company's overall CCR plan, or regarding any specific expenditures other than the ones to be recovered in this case.

Moreover, the Commission noted that it had explicitly stated that its order in that proceeding should "not be construed as determining the prudence and reasonableness of [Dominion]'s overall CCR plan, or the prudence and reasonableness of any specific CCR expenditures other than the ones deferred and authorized to be recovered in this case," *Application of Va. Elec. & Power Co., Ord. Approving Rate Increase and Cost Deferrals and Revising PJM Regul. Conditions*, Docket No. E-22, Sub 532, at *3 (N.C.U.C. Dec. 22, 2016), and that it would be "inappropriate to give the 2016 [Dominion] Rate Case Order precedential effect" in view of the fact that the evidence that had been presented in that proceeding was "far less extensive" than the evidence that had been presented in this proceeding given that Dominion and the Public Staff had entered into a stipulation in the earlier proceeding, so that the "issues of prudence and reasonableness were not fully litigated and no significant evidentiary record was developed."

¶ 14 According to the Commission, Dominion had made a prima facie showing that the coal ash-related costs that it had incurred between 1 July 2016 and 30 June 2019 had been prudently incurred in light of

the fact that the company had largely discontinued wet storage of coal ash and moved towards storing dry ash in lined landfills. On the other hand, the Commission noted that, even though the Public Staff had not "expressed [an] opinion on the prudence and reasonableness of the [coal ash c]osts," one of its witnesses had "testified to a number of deficiencies in [Dominion]'s historical management of [coal ash] and the resulting environmental impacts," such as late and deficient groundwater monitoring, the decision to ignore a recommendation to construct a dry waste disposal facility at one of the coal ash sites, and groundwater data showing exceedances of certain elements and heavy metals such as barium, cadmium, copper, iron, manganese, nickel, phenols, potassium, sodium, and zinc at one of the coal ash sites. In addition, the Commission noted the existence of evidence that "call[ed] into question" the prudence of the manner in which Dominion had incurred certain coal ash-related costs, such as the fact that, prior to the adoption of the CCR Rule, Dominion had planned to permanently store some of its coal ash in unlined wet ponds and to cover the ponds with soil, a practice that was likely to cause hydraulic pressure in the ponds and facilitate the continued migration of coal ash-related pollutants into the surrounding groundwater.

¶ 15 In finding that Dominion's coal ash costs had been prudently incurred, the Commission noted that, "while the evidence demonstrates a difference of opinion or dispute as to whether certain [of Dominion]'s actions, omissions or decisions were prudent," neither party had "presented evidence to attempt to quantify which, if any, of the [coal ash c]osts might have been avoided if [Dominion] had used a different approach to managing [coal ash recovery] at some point during the last several decades" and stated that

> it would be very difficult to go back and recreate the timing and cost of such different approaches. For example, one could argue that [Dominion] should have converted all of its coal-fired plants to dry ash handling at least at some time during the 1990s. However, to quantify the costs and benefits of this strategy would require establishing, with some level of certainty, the costs that [Dominion] would have incurred for such conversions, and the savings in present [coal ash] remediation costs that would have resulted from such conversions. In addition, [Dominion] could have been entitled to recover those conversion costs, plus a return on its increased

> rate base, from its ratepayers over the past several decades. On the present record, the Commission has no substantial evidence on which to make such determinations. Thus, based on the foregoing, . . . the Commission concludes that the [coal ash c]osts were prudently incurred.

¶ 16 After reaching this conclusion, the Commission determined that it would be "just and reasonable" to deny Dominion a return on the unamortized balance of the coal ash costs that it had incurred between 1 July 2016 and 30 June 2019 and to permit the amortization of those costs over a ten-year period. In support of this result, the Commission concluded that:

> **Ratemaking Treatment of Recoverable CCR Costs**
>
> 53. Just and reasonable rates will be achieved by excluding from rate base the CCR Costs and amortizing recovery of the CCR Costs over a period of ten years.
>
> 54. It is reasonable, based on the evidence in the record in this proceeding, for [Dominion] to recover its financing costs on the CCR Costs incurred during the Deferral Period, up to the effective date of rates approved pursuant to this Order, calculated at [Dominion]'s previously authorized weighted average cost of capital.
>
> 55. It is reasonable, based on the evidence in the record in this proceeding for annual compounding to be used in calculating the financing costs of deferred costs, including the CCR Costs, during the Deferral Period.

As further support for this determination, the Commission reasoned that Dominion should not be allowed to earn a return on the unamortized balance of coal ash costs in light of:

> (1) the Commission's obligation to set just and reasonable rates that are fair to both the utility and the ratepayer in accordance with N.C.G.S. § 62-133(a); (2) the Commission's historical treatment of extraordinary, large costs, such as [Manufactured Gas Plant] environmental remediation costs and plant cancellation costs; and (3) the Commission's obligation to

> consider all other material facts of record that will enable it to determine what are just and reasonable rates in accordance with N.C.G.S. § 62-133(d).

More specifically, the Commission noted that, when Public Service Company of North Carolina, Inc., had sought recovery of substantial costs incurred for the purpose of remediating hazardous by-products that were created at manufactured natural gas plants, it had determined that, while the utility should be authorized to amortize its prudently incurred remediation costs to rates over a period of years, the company should not be allowed earn a return on the unamortized balance of those costs on the grounds that such a result struck the "proper balance between ratepayer and shareholder interests" and gave the utility "an incentive to minimize clean-up costs and to pursue contributions from third parties where appropriate." In addition, the Commission cited to a 1983 order in a proceeding in which Dominion had sought to include costs associated with the abandonment of certain proposed nuclear generating facilities in the calculation of its North Carolina retail rates, *Application of Va. Elec. and Power Co. for Auth. to Adjust and Increase Its Elec. Rates and Charges*, No. E-22, Sub 273, 73 N.C.U.C. Orders & Decisions 343, 355 (Dec. 5, 1983), and in which the Commission had concluded that, while the relevant nuclear plant abandonment costs had been prudently incurred and should be amortized to rates, Dominion should not be allowed to earn a return on the unamortized balance of those costs on the theory that "[a] middle ground must be found on which the Company bears some of the risk of abandonment and the ratepayer is protected from unreasonably high rates." *Id.*

¶ 17 Furthermore, the Commission concluded that it had a "well-established history of allocating prudently incurred costs, specifically in the context of extraordinary, large costs such as environmental clean-up and plant cancellation costs, between ratepayers and shareholders in order to strike a fair and reasonable balance" and that "fairness dictate[d] this same treatment" in the present proceeding. According to the Commission, "[a] number of material facts in evidence call[ed] into question the prudence" of Dominion's coal ash-related costs, including the occurrence of groundwater violations and its refusal to build a dry waste storage facility at the Possum Point plant contrary to the standards for coal ash storage that the Environmental Protection Agency had adopted by that time. The Commission further noted that the total amount of coal ash-related costs that Dominion had incurred during the relevant period was "significant" and would affect the rates paid by end-user customers. Finally, the Commission concluded that allowing

Dominion to earn a return on the unamortized balance of the relevant coal ash-related costs would "violate[ ] the matching principle and raise[ ] intergenerational equity concerns" by requiring current customers to pay for the remediation of waste associated with past power generation. As authorized by N.C.G.S. § 62-133(d), the Commission stated that it had "consider[ed] these material facts of record when striking the appropriate balance between shareholder and customer interests to set just and reasonable rates" and concluded that "[a] fair and reasonable balance is found which requires [Dominion]'s shareholders to bear some of the risk of clean-up costs associated with CCR liabilities and protects the ratepayers from unreasonably high rates."

¶ 18 In determining that Dominion's coal ash costs should be amortized to rates over a period of ten years, the Commission found that Dominion's "proposed five-year amortization period does not achieve a fair balance in light of the evidence in the record, the magnitude and the nature of the costs involved and the rate impact to customers." On the other hand, the Commission declined to accept the Public Staff's proposed eighteen-year amortization period on the grounds that a ten-year amortization period struck a "more appropriate and fairer balance" and was consistent with the Commission's "historical treatment of major plant cancellations" as evidenced by the fact that the Commission had "consistently used a write-off period of 10 or fewer years for all major plant cancellations." *Application of Va. Elec. and Power Co. for Auth. to Adjust and Increase Its Elec. Rates and Charges*, No. E-22, Sub 273, 73 N.C.U.C. Orders & Decisions 343, 355. As a result, the Commission authorized the amortization of the coal ash-related costs that Dominion had incurred between 1 July 2016 and 30 June 2019 to rates over a ten year period while disallowing Dominion's request to be allowed to earn a return on the unamortized balance of those costs.[2] Dominion noted an appeal to this Court from the Commission's order.[3]

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2. Before an appeal was noted to this Court from the Commission's order, both Dominion and the Public Staff filed motions seeking reconsideration and clarification of the Commission's decision. In upholding its decision to refrain from awarding Dominion a return on the unamortized balance of the deferred coal-ash-related costs, the Commission stated that it had "fully considered all of the facts in evidence, applied the various provisions of the Act to those facts in evidence and reached its decisions . . . in the interest of achieving just and reasonable rates." Similarly, in upholding its decision to require the use of a ten-year amortization period, the Commission stated that it had "fully considered all of the facts in evidence and the applicable precedents in reaching its decision to set the amortization period for CCR Costs at ten years."

3. Although the Attorney General initially noted a cross-appeal from the Commission's order, he subsequently sought and obtained the entry of an order dismissing this cross-appeal.

II. Analysis

A. Standard of Review

¶ 19 According to N.C.G.S. § 62-94 (2021), the applicable standard of review utilized by this Court in reviewing Commission orders requires us to

> decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions, or
>
> (2) In excess of statutory authority or jurisdiction of the Commission, or
>
> (3) Made upon unlawful proceedings, or
>
> (4) Affected by other errors of law, or
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or
>
> (6) Arbitrary or capricious.

N.C.G.S. § 62-94(b). A Commission decision is "arbitrary and capricious when, among other things, [it] indicate[s] a lack of fair and careful consideration or fail[s] to display a reasoned judgment." *State ex rel. Utils. Comm'n v. Thornburg*, 314 N.C. 509, 515 (1985). In deciding whether to affirm, reverse, invalidate or remand the Commission's decision for further proceedings, we are required to review "the whole record or such portions thereof as may be cited by any party" and take "due account" of "the rule of prejudicial error." N.C.G.S. § 62-94(c).

¶ 20 According to well-established North Carolina law, "the rates fixed or any rule, regulation, finding, determination, or order made by the Commission" are considered "prima facie just and reasonable." *Id.* at § 62-94(e). For that reason,

> [t]he burden is on the appellant to demonstrate an error of law in the proceedings. To be arbitrary and capricious, the Commission's order would have to show a lack of fair and careful consideration of the evidence or fail to display a reasoned judgment.

State ex rel. Utilities Comm'n v. Piedmont Nat. Gas Co., 346 N.C. 558, 573 (1997) (citations omitted). A reviewing court examines the Commission's findings of fact for the purpose of determining whether they are supported by "competent, material and substantial evidence," *State ex rel. Utils. Comm'n v. Cooper*, 367 N.C. 444, 448 (2014), with the Commission being "responsible for determining the weight and credibility to be afforded to the testimony of any witness, including any expert opinion testimony," and with the Commission's "decision being entitled to great deference given that its members possess an expertise in utility ratemaking." *State ex rel. Utilities Comm'n v. Stein*, 375 N.C. at 900. "Assuming adequate findings of fact, supported by competent, substantial evidence, the Commission's determination, reached pursuant to the mandate of N.C.G.S. § 62-133 and to the statutory procedural requirements, may not be reversed even if [this Court] would have reached a different conclusion upon the evidence." *Id.* (cleaned up) (quoting *State ex rel. Utils. Comm'n v. Morgan*, 277 N.C. 255, 266–67 (1970)). The Commission's conclusions of law are, however, subject to de novo review for legal error on appeal. *State ex rel. Utils. Comm'n v. N.C. Waste Awareness & Reduction Network*, 255 N.C. App. 613, 615 (2017), *aff'd per curiam*, 371 N.C. 109 (2018).

B. Denial of a Return on the Unamortized Balance of CCR Costs

¶ 21 In its initial challenge to the Commission's order, Dominion argues that the Commission erred by rejecting its request to be allowed to earn a return on the unamortized balance of its coal ash-related costs. According to Dominion, the Commission "failed to set forth *any* facts to support its break with its own precedent" that was established in the 2016 Dominion rate case and 2017 Duke Energy rate cases, with this failure to follow its own past precedent compelling the conclusion that the Commission had acted arbitrarily and capriciously in violation of the Public Utilities Act and the relevant provisions of the state and federal constitutions.

¶ 22 According to Dominion, this Court held in *Stein* that the Commission had correctly determined that the Duke Energy utilities should be allowed to earn a return on the unamortized balance of their coal ash costs, with the findings that the Commission had made in that case

having sufficed to establish that the enactment of the CCR Rule and certain North Carolina statutory provisions "forced the utilities to confront an 'extraordinary and unprecedented' issue involving the potential expenditure of billions of dollars in order to address a significant environmental problem" and that, in light of "the 'magnitude, scope, duration and complexity' of the anticipated costs" of coal ash cleanup, a return on the unamortized balance was fair and just. *Stein*, 375 N.C. at 926. Dominion claims that, since the facts at issue in this case are similar to those that were before the Commission in *Stein*, the Commission acted arbitrarily and capriciously "by exercising its discretion differently and to the detriment of [Dominion] in this case after exercising it to the benefit of Duke Energy."

¶ 23 After conceding that Commission decisions are "not automatically binding on future Commissions," Dominion contends that the Commission "explicitly chose to give its ratemaking treatment of coal ash costs in the 2016 [Dominion] rate case decision precedential value" in deciding the 2017 Duke Energy rate case and that the Commission "provided no reasoned basis for departing from its 2016 [Dominion] Rate Case Order" when deciding this case, even though it "involved the same coal plants and same types of costs." In Dominion's view, even though the Commission heard the "same theories" regarding the imprudence with which coal combustion residuals had been handled in this case that it had heard in the 2016 Dominion rate case and 2017 Duke Energy rate cases, it "reached a different result — denying a return on prudently incurred costs — without ever concluding that [Dominion] imprudently managed its coal ash." As a result of the fact that the Commission found that the record did not support a finding of imprudence even though the evidence "raise[d] questions" about the prudence with which Dominion's coal ash-related costs had been incurred and that, "given the passage of time and evolving regulatory standards," Dominion was entitled to a presumption of prudency, the Commission "arbitrarily and unlawfully created a separate, lower standard" by finding that Dominion's conduct was less than prudent but more than imprudent.

¶ 24 Furthermore, Dominion argues that the Commission had acted arbitrarily and capriciously by determining that Dominion's coal ash-related costs did not constitute property that was "used and useful" after reaching the opposite conclusion in the 2016 Dominion rate case, in which it had determined that "existing CCR repositories continue to be used and useful for storing CCRs, and will continue to be used and useful until [Dominion] moves the CCRs to a permanent repository." Dominion claims that the arbitrary and capricious nature of the Commission's

order is demonstrated by the fact that it allows a return on the company's coal ash-related costs during the deferral period, which ran from 1 July 2016 through 30 June 2019, while refusing to allow a return on those same costs during the subsequent recovery period.

¶ 25 In Dominion's view, "[t]he coal ash costs at issue in this case deserved, but did not receive, the same treatment" that they had received in the 2016 Dominion rate cases and the 2017 Duke Energy cases. Dominion claims that, even though "[a]ny differences that exist between [Dominion] and Duke Energy warrant more favorable ratemaking treatment for" Dominion given that Duke Energy had pled guilty to the commission of environmental crimes, including criminal negligence, while there had been no similar findings of mismanagement or unlawful activity on the part of Dominion, "[Dominion] finds itself in a far worse position than Duke Energy." According to Dominion, the Commission "failed to articulate any grounds for treating [Dominion] differently than Duke Energy" and, in spite of the fact that the Commission is "not bound by the doctrines of *res judicata* or *stare decisis*, the Commission cannot 'arbitrarily' disregard its own precedent," quoting N.C.G.S. § 62-94(c) and *State ex rel. Utils. Comm'n v. Nantahala Power & Light Co.*, 326 N.C. 190, 199 (1990) (holding that, although "the Commission is not covered by our Administrative Procedure Act," it is "still an administrative agency of the state government, and general tenets of administrative law are applicable to its operation except where modified by statute"). In spite of this fact, Dominion contends that the Commission's "discussion of the 2016 [Dominion] rate case is limited to explaining that a stipulation precludes it from being considered precedent here" even though that decision "was accepted as precedent in the Duke Energy rate cases," with the Commission's failure to explain the reasons for its decision to treat the two utilities differently constituting arbitrary and capricious decision-making.

¶ 26 Finally, Dominion asserts that the Commission's failure to afford equal treatment to Duke and Dominion violates the equal protection clauses of the state and federal constitutions, with the company having directed our attention to *Cheek v. City of Charlotte*, 273 N.C. 293 (1968), in which this Court held that legislation prohibiting the provision of massages to a member of the opposite sex at massage parlors, but not at barber shops or health clubs, was arbitrary and constituted impermissibly discriminatory legislation, and *Connecticut Light & Power Co. v. Fed. Energy Regul. Comm'n*, 627 F.2d 467, 473 (D.C. Cir. 1980), in which the United States Court of Appeals for the District of Columbia Circuit noted that "treating regulated entities, whose apparent fact

situation is stipulated to be the same, in a markedly different manner might give rise to an Equal Protection problem." According to Dominion, the Commission's "fail[ure] to articulate any factors or rational basis for subjecting [Dominion] to different treatment than identically situated North Carolina electric utilities" violated Dominion's right to equal protection.

¶ 27 In seeking to persuade us to affirm the Commission's order, the Public Staff argues that the Commission properly exercised its authority pursuant to N.C.G.S. § 62-133(d) by determining that Dominion should not be allowed to earn a return upon the unamortized balance of its coal ash-related costs. The Public Staff notes that the Commission's ratemaking decisions are not subject to stare decisis or res judicata principles in light of the fact that such decisions are legislative, rather than judicial, in nature given that in, "fixing rates . . . the Commission [exercises] a function delegated to it by the legislative branch of government." *State ex rel. Utils. Comm'n v. Thornburg*, 325 N.C. 463, 469 (1989) (holding that, since the Commission was exercising a legislative function, the manner in which it provided for the inclusion of nuclear cancellation costs in rates in prior cases was not entitled to res judicata effect); *see also State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n*, 348 N.C. 452, 472 (1998) (stating that "[a] final order of the [Commission] in a general rate case is not within the doctrine of *stare decisis*").

¶ 28 According to the Public Staff, the Commission made sufficient findings of fact to "explain[ ] why a divergence from the usual ratemaking standards would be appropriate and why the approach that the Commission ha[d] adopted would be just and reasonable to both utilities and their customers" as required by this Court's decision in *Stein*, 375 N.C. at 926. As an initial matter, the Public Staff points to the Commission's discussion of three previous rate cases that involved including in rates the "extraordinary, large costs such as environmental clean-up and plant cancellation" costs and in which the Commission had apportioned the responsibility for those costs "between ratepayers and shareholders" by amortizing the costs to rates while denying the utility's request to be allowed to earn a return on the unamortized balance. Secondly, the Public Staff directs our attention to the Commission's finding that a "number of material facts in evidence call into question the prudence of [Dominion's] actions and inaction and the risks accepted by [Dominion] management" at the utility's coal ash disposal sites, arguing that this evidence provides further support for the Commission's decision to require sharing of those costs between Dominion and its customers. *See Stein*, 375 N.C. at 931 (reversing the Commission's order, in part, and holding that the Commission was required "to evaluate the extent

to which the utilities committed environmental violations" in setting the utility's rates pursuant to N.C.G.S. § 62-133(d) "even if any such environmental violations did not result from imprudent management"). Thirdly, the Public Staff notes the Commission's reference to the "matching principle," which "dictates that customers who use an asset should pay for the asset at the time it is used" instead of requiring "present and future customers [to] pay for costs incurred related to service provided in the past." Fourthly, the Public Staff notes that utilities are generally required to collect asset retirement costs over the useful life of the asset, with the Commission having found that its order was "further supported by the failure of [Dominion] to properly account for the full decommissioning costs of its coal-fired power plants" and Dominion's failure to include those costs in rates during the period when those facilities were actually being used to generate electricity.

¶ 29 The Public Staff denies that the Commission had erred by failing to make the same findings and conclusions in this case that it made in the 2016 Dominion rate case and the 2017 Duke Energy rate cases. In the Public Staff's view, the Commission did, in fact, provide a "reasoned basis for departing from" its decision in the 2016 Dominion order by pointing out that the 2016 order explicitly stated that it did "not have precedential value with respect to the [coal ash] issues" that were before the Commission in that case because the 2016 Dominion rate case involved a stipulation between Dominion and the Public Staff instead of having been fully litigated. Similarly, the Public Staff contends that the Commission did not err by reaching a different outcome in this case than it had in the 2017 Duke rate cases, at least, in part, because the 2017 Duke rate cases were on appeal when this case was heard and decided and because the Commission's orders in those cases were ultimately reversed by this Court in *Stein*, resulting in a settlement between Duke and certain intervenors that was markedly less favorable to Duke than the Commission's initial orders. Finally, the Public Staff argues that the Commission's decision does not work any sort of equal protection violation given that such challenges to a utility ratemaking decision must be rejected as long as the Commission's decision is rationally related to a legitimate government purpose, which this one clearly is.

¶ 30 The rates for utility service charged by North Carolina retail ratepayers must be "just and reasonable." N.C.G.S. § 62-131. For that reason, the Commission is required to fix rates that are "fair both to the public utilities and to the consumer," N.C.G.S. § 62-133(a), by

> (1) Ascertain[ing] the reasonable original cost or the fair value under G.S. 62-133.1A of the public utility's

> property used and useful . . . in providing the service rendered to the public within the State, less that portion of the cost that has been consumed by previous use recovered by depreciation expense.
>
> . . . .
>
> (2) Estimat[ing] such public utility's revenue under the present and proposed rates.
>
> (3) Ascertain[ing] such public utility's reasonable operating expenses, including actual investment currently consumed through reasonable actual depreciation.
>
> (4) Fix[ing] such rate of return on the cost of the property ascertained pursuant to subdivision (1) of this subsection as will enable the public utility by sound management to produce a fair return for its shareholders, considering changing economic conditions and other factors, including, but not limited to, the inclusion of construction work in progress in the utility's property under sub-subdivision b. of subdivision (1) of this subsection, as they then exist, to maintain its facilities and services in accordance with the reasonable requirements of its customers in the territory covered by its franchise, and to compete in the market for capital funds on terms that are reasonable and that are fair to its customers and to its existing investors.

N.C.G.S. § 62-133(b). In addition, the Commission is required, during the ratemaking process, to "consider all other material facts of record that will enable it to determine what are reasonable and just rates." *Id.* § 62-133(d).

¶ 31 According to N.C.G.S. § 62-79(a), "all final orders and decisions of the Commission shall be sufficient in detail to enable the court on appeal to determine the controverted questions presented in the proceedings and shall include" "[f]indings and conclusions and the reasons or bases therefor upon all the material issues of fact, law, or discretion presented in the record." According to well-established North Carolina law, "[t]he Commission . . . is not required to 'comment upon every single fact or item of evidence presented by the parties.' " *State ex rel. Utils. Comm'n v. Public Staff-N.C. Util. Comm'n*, 323 N.C. 481, 496-97 (1988) (quoting

State ex rel. Utils. Comm'n v. Eddleman, 320 N.C. 324, 351 (1987)). Instead, "[t]he Commission's summary of the appellant's argument and its rejection of the same is sufficient to enable the reviewing court to ascertain the controverted questions presented in the proceeding," which is all that is required. *State ex rel. Utils. Comm'n v. Conservation Council of N.C.*, 312 N.C. 59, 62 (1984). As a result, this Court has held that findings of fact that "demonstrate that the Commission considered the impact of changing economic conditions upon customers" and that "specify how this factor influenced the Commission's decision to authorize a 10.2% [return on equity]," *State ex rel. Utils. Comm'n v. Cooper*, 367 N.C. 741, 748 (2015), were sufficient to pass muster on appellate review.

¶ 32 The essence of the argument that Dominion has presented for our consideration in this case is that, since the facts contained in the record developed in this case were essentially identical to those contained in the records developed in the company's 2016 rate case and in the 2017 Duke Energy rate cases, the Commission erred by failing to conclude that Dominion was entitled to earn a return on the unamortized balance of its coal ash-related costs consistently with the decisions that the Commission had made in those earlier proceedings. In *Stein*, we addressed the issue of whether the Commission possessed the discretion, pursuant to N.C.G.S. § 62-133(d), to allow utilities to earn a return on their coal ash cleanup and recovery costs, even if such costs were characterized as operating expenses rather than as property used and useful. 375 N.C. at 914. In holding that the Commission possessed the authority to act in this fashion, we noted that, even though the procedures for establishing just and reasonable rates as outlined in N.C.G.S. § 62-133(b) "provide a workable framework" for setting just and reasonable rates for utility service, the circumstances at issue in that case were "anything but ordinary, with the coal ash-related costs that [Duke Energy had] incurred between 1 January 2015 and 31 December 2017 not being readily susceptible to traditional ratemaking analysis for a number of reasons." *Id.* at 921.

¶ 33 After a thorough analysis of this Court's prior decisions interpreting the nature and extent of the Commission's authority pursuant to N.C.G.S. § 62-133(d), we determined that our precedent "clearly indicated that N.C.G.S. § 62-133(d) is available to the Commission for the purpose of dealing with unusual situations and that the authority granted to the Commission pursuant to N.C.G.S. § 62-133(d) is not limited by the more specifically stated ratemaking principles set out elsewhere in N.C.G.S. § 62-133(b)." *Id.* at 925. As a result, we held that

> the Commission may employ N.C.G.S. § 62-133(d) in situations involving (1) unusual, extraordinary, or complex circumstances that are not adequately addressed in the traditional ratemaking procedures set out in N.C.G.S. § 62-133; (2) in which the Commission reasonably concludes that these circumstances justify a departure from the ordinary ratemaking standards set out in N.C.G.S. § 62-133; (3) determines that a consideration of these "other facts" is necessary to allow the Commission to fix rates that are just and reasonable to both the utility and its customers; and (4) makes sufficient findings of fact and conclusions of law supported by substantial evidence in light of the whole record explaining why a divergence from the usual ratemaking standards would be appropriate and why the approach that the Commission has adopted would be just and reasonable to both utilities and their customers.

Id. at 926.

¶ 34 In applying the four-part test enunciated in *Stein* to the facts at issue in that proceeding, we determined that the Commission had not erred "by allowing the amortization of deferred coal ash costs to rates" and by allowing Duke Energy "to earn a return on the unamortized balance" of those costs in that case given that "the enactment of CAMA forced [Duke Energy] to confront an 'extraordinary and unprecedented' issue involving the potential expenditure of billions of dollars in order to address a significant environmental problem" and that, "[i]n light of the 'magnitude, scope, duration and complexity' of the anticipated costs," a return on the unamortized balance of the costs would reasonable. *Id.* at 926. On the other hand, we also held that, once the Commission had decided to invoke its authority pursuant to N.C.G.S. § 62-133(d) to consider "other facts," it "was required to consider *all* material facts of record . . . including, in these cases, facts pertaining to alleged environmental violations such as non-compliance with NPDES permit conditions, unauthorized discharges, and groundwater contamination from the coal ash basins[.]" *Id.* at 931. In view of the fact that the Commission "appear[ed] to have determined that it lacked the authority to comment upon the nature and extent of any environmental violations that the utilities may or may not have committed" in setting rates pursuant to N.C.G.S. § 62-133(d), we reversed the portion of the Commission's order that rejected the Public Staff's "equitable sharing" proposal and remanded this

case to the Commission for further proceedings, including the making of appropriate findings of fact and conclusions of law relating to the validity of the Public Staff's proposal. *Id.* at 932–33.

¶ 35 Over two decades ago, this Court upheld the Commission's use of its discretionary authority pursuant to N.C.G.S. § 62-133(d) to allow a utility to amortize nuclear plant cancellation costs while rejecting the utility's request to earn a return on the unamortized balance of those costs in *State ex rel. Utilities Comm'n v. Thornburg*, 325 N.C. 463 (1989). In *Thornburg*, the utility sought a general rate increase that was predicated, in part, upon an attempt to reflect the costs associated with the abandonment of a proposed nuclear generating facility at the Shearon Harris nuclear plant in its retail rates. *Id.* at 465. In its opinion, the Court noted that, in a previous rate case regarding two other cancelled nuclear units at the Shearon Harris site, the Commission had allowed the utility to amortize the cancellation costs associated with the two other units "over a ten-year period" while determining that "no return [would be] allowed on or with respect to the unamortized balance" of the cancellation costs. *Id.* at 466. In the case that was actually before this Court, the Commission allowed the utility to amortize the relevant cancellation costs to rates over a period of ten years without allowing the utility to earn a return on the unamortized balance. On appeal, the Attorney General argued that the Commission had acted beyond the scope of its statutory authority in allowing the utility to amortize any of the relevant nuclear plant cancellation costs to rates and that his ability to advance this argument was not precluded by the doctrine of res judicata arising from the Commission's earlier decision. *Id.* at 467.

¶ 36 In holding that "the Commission's treatment of cancellation costs in prior orders is not res judicata in this proceeding," *id.* at 471, we noted that,

> in addressing the issue of whether a Commission order can be deemed res judicata this Court has held that "only specific questions actually heard and finally determined by the Commission in its *judicial* character are *res judicata*, and then only as to the parties to the hearing." *Utilities Commission v. Area Development, Inc.*, 257 N.C. 560, 570, 126 S.E.2d 325, 333 (1962) (emphasis added). Moreover, this Court has stated that ratemaking activities of the Commission are a legislative function. *Utilities Comm. v. Edmisten, Attorney General*, 294 N.C. 598, 603, 242 S.E.2d 862, 866 (1978); *Utilities Commission*

> *v. General Telephone Company*, 281 N.C. 318, 336, 189 S.E.2d 705, 717 (1972). It follows that[,] since the exercise of the Commission's ratemaking power is a legislative rather than a judicial function, such orders are not governed by the principles of res judicata and are reviewable by this Court in later appeals of closely related matters.

Id. at 468. After determining that the Commission had the authority to treat costs associated with the cancellation of the third nuclear unit at the Shearon Harris facility differently than it had treated the first two, we further held that the Commission did "not err as a matter of law in authorizing [the utility] to continue to recover a portion of the cancellation costs of the abandoned Harris Plant as operating expenses through amortization" in light of its discretion "to consider all material facts in the record in determining rates" pursuant to N.C.G.S. § 62-133(d). *Id.* at 476.

¶ 37 Similarly, we held in *State ex rel. Utils. Comm'n. v. Carolina Util. Customers Ass'n*, that, while "prior decisions of this Court regarding general questions of law" relevant to the ratemaking process were entitled to stare decisis effect, "the final order of the Commission in a general rate case is not within the doctrine of stare decisis[.]" 348 N.C. 452, 472 (1998) (cleaned up) (quoting *State ex rel. Util. Comm'n v. Carolina Power & Light Co.*, 250 N.C. 421, 430 (1959)). Thus, well-established principles of North Carolina law establish that prior Commission decisions, as compared to prior decisions of this Court, are not entitled to either res judicata or stare decisis effect. In light of that fact, we have no difficulty in holding that the Commission was not obligated to make the same decision with respect to the manner in which Dominion was entitled to reflect the costs associated with coal ash remediation in rates in this case that it made in the 2016 Dominion rate case or the 2017 Duke rate cases.[4]

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4. As an aside, we note that the concept of stare decisis requires, in essence, that a court identify certain material differences between the case that is currently before the court and potentially-relevant precedent before declining to follow that precedent. A requirement that the Commission explicitly distinguish prior precedent as a precondition for declining to follow it seems, aside from having no support of any nature in this Court's precedent, to be inconsistent with the basic principle of North Carolina ratemaking law that prior Commission decisions do not have stare decisis effect. The decisions upon which Dominion relies in arguing for the imposition of such a requirement in this case, such as *Nat'l Weather Serv. Employees Org. v. FLRA*, 966 F.3d 875 (D.C. Circ. 2020) (dispute over a termination provision in a collective bargaining agreement); *New Eng. Power Generators Ass'n v. FERC*, 881 F.3d 202 (D.C. Circ. 2018) (appellate review of a complaint alleging that an independent transmission system operator's tariff was unreasonably discriminatory); *West Deptford Energy, LLC v. FERC*, 766 F.3d 10 (D.C. Cir. 2014) (determination of which rate applied when more than one had been filed);

¶ 38 In addition, we are unable to conclude that the Commission acted arbitrarily and capriciously in approving different ratemaking treatments for the coal ash-related costs at issue in this case as compared to those at issue in the 2016 Dominion general rate case and 2017 Duke general rate cases. Instead of indicating the absence "of fair and careful consideration or [the] fail[ure] to display a reasoned judgment," *Thornburg*, 314 N.C. at 515, the Commission's order in this case demonstrated a thorough consideration of the record evidence, adequately explained the reasons for the decision that the Commission did make, and reflected a ratemaking treatment of the relevant costs that failed to track the proposals made by either the utility or the Public Staff.

¶ 39 As evidence of its even-handed consideration of the matters at issue in this case, we note that the Commission's order contains a detailed summary of the circumstances surrounding Dominion's incurrence of the coal ash-related costs and an explanation of the reasons that it had questions concerning the extent to which Dominion had acted prudently, which included the nature and extent of the exceedances associated with groundwater contaminants related to Dominion's coal ash storage facilities, instances of late and deficient groundwater monitoring, and Dominion's decision to ignore a recommendation for the construction of a dry waste disposal facility at a particular site. In addition, the Commission highlighted the risks inherent in certain of the decisions that Dominion had made with respect to the relevant coal ash-related costs, including the fact that, prior to enactment of the CCR Rule, Dominion had deemed unlined ponds to be a permanent storage solution for coal ash and had planned to close its existing wet storage facilities in place, an approach that would have allowed the continued leaching of coal combustion residuals into the groundwater.

¶ 40 Acknowledging that the record did not provide "substantial evidence" to support the making of a full and informed decision concerning the prudence of the manner in which the relevant coal ash-related costs had been incurred, the Commission concluded that "none of the CCR Costs incurred by the Company between July 1, 2016 through June 30, 2019 [would] be disallowed on the basis of having been imprudently incurred" and authorized Dominion to amortize all of those costs to

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Trump Plaza Assocs. v. NLRB, 679 F.3d 822 (D.C. Cir. 2012) (employer challenge to the certification of a union election); *BB&L, Inc. v. NLRB*, 52 F.3d 366 (D.C. Cir. 1995) (employer refusal to bargain with a union), all appear to have been made in the context of adjudication proceedings conducted pursuant to the federal Administrative Procedure Act, 5 U.S.C. § 554 (2022), rather than any sort of proceeding that is functionally equivalent to a general rate case conducted pursuant to N.C.G.S. § 62-133.

rates. On the other hand, the Commission rejected Dominion's request to be allowed to earn a return on the unamortized balance of the relevant coal ash-related costs after considering multiple factors, such as the Commission's "history of allocating prudently incurred costs, specifically in the context of extraordinary, large costs such as environmental clean-up and plant cancellation, between ratepayers and shareholders"; the evidence that called the prudence with which the relevant coal ash-related costs had been incurred into question; the "significant" costs that were at issue in this case, which would have resulted in material additions to the amount that each of Dominion's North Carolina retail ratepayers would have had to pay had the company's proposal been adopted; and a concern that approval of Dominion's proposed treatment of the relevant costs would violate the "matching" principle and raise significant concerns for intergenerational equity.

¶ 41 As a result of the fact that the Commission's findings of fact are "supported by competent, substantial evidence" and the fact that the basis for the Commission's decision is adequately explained in its order and reflects an accurate understanding of North Carolina ratemaking law as set out in prior decisions from this Court, *Stein*, 375 N.C. at 900, we have no legal basis for disturbing the Commission's order in this case. Although Dominion's dissatisfaction with the Commission's order is understandable, it has failed to show that the Commission's decision lacks adequate record support, misapplies the applicable ratemaking statutes, or fails to embody a reasoned decision. Instead, at the end of the day, Dominion's challenge to the Commission's order amounts to little more than a belief that the Commission should have weighed the evidence differently and reached a different result and that we should intervene to require that a different outcome be reached in spite of the fact that "[t]he Commission is responsible for determining the weight and credibility to be afforded to the testimony of any witness, including any expert opinion testimony" and the fact that the Commission's decision is "entitled to great deference." *Stein*, 375 N.C. at 900.

¶ 42 In addition, we note that, even if Dominion's argument that the Commission was required to follow its earlier decisions in the 2016 Dominion rate case and the 2017 Duke rates cases or to explain its reasons for failing to do so had merit, which it does not, the record contains ample support for any decision that the Commission might have made to refrain from doing so. As we have already noted, the Commission's order in the 2016 Dominion rate case rested upon a settlement between the parties, with both the stipulation itself and the resulting Commission order having made it abundantly clear that any decision that the Commission might make in that proceeding would not be deemed to have precedential

effect, *Application of Va. Elec. & Power Co., d/b/a Dominion N.C. Power, for Adjustment of Rates and Charges Applicable to Elec. Util. Serv. in N.C.*, Docket No. E-22, Sub 532, 2016 N.C. PUC LEXIS 1183, at *137–39 (N.C.U.C. Dec. 22, 2016), in light of the Commission's statement that Dominion and the Public Staff had "agree[d] that the appropriate amortization period for future CCR expenditures shall be determined on a case-by-case basis"; that there would be no "prejudice to the right of any party to take issue with the amount or the treatment of any deferral of ARO costs in a rate case or other appropriate proceeding"; that Dominion and the Public Staff "reserve[d] their rights in the Company's next general rate case to argue . . . (a) how the unamortized balance of deferred CCR expenditures . . . should be addressed; and (b) how reasonable and prudent CCR expenditures incurred by the Company . . . should be recovered"; and that the Public Staff's agreement to the stipulation should "not be construed as a recommendation that the Commission reach any conclusions regarding the prudence and reasonableness of the Company's overall CCR plan." *Id.* As a result, one of the decisions upon which Dominion relies in support of its "precedent-based" argument expressly disclaims any idea that precedent had actually been created.

¶ 43 Dominion's reliance on the Commission's orders in the 2017 Duke rate cases is equally misplaced. Although the Commission did, to be sure, allow the Duke companies to amortize their coal ash-related costs to rates over a five-year period and to earn a return on the unamortized balance in their initial orders in these cases, the Commission also imposed substantial mismanagement penalties upon the Duke utilities that were not imposed upon Dominion in this case. In addition, the facts surrounding the manner in which Dominion and the Duke companies incurred their coal ash-related costs were, as is reflected in the relevant Commission orders, markedly different. Finally, the 2017 Duke rate orders were partially overturned on appeal and remanded for further consideration by the Commission, eventually resulting in a settlement that reduced the amount of coal ash-related costs included in the rates charged by the Duke companies to their North Carolina retail ratepayers by "more than $900 million." Under this set of circumstances, it is hard for us to see how the Commission's refusal to explain why it failed to follow decisions that were, at the time, pending on appeal could possibly constitute prejudicial error. N.C.G.S. § 62-94(c) (requiring reviewing courts to take due account of "the rule of prejudicial error").[5] As

5. In our view, moreover, the Commission adequately discussed its reasons for failing to follow the prior Duke Energy orders by noting that they were on appeal at that time and by mentioning those orders no less than eight times in discussing the manner in which

a result, the 2017 Duke rate orders that the Commission unlawfully, at least in Dominion's eyes, failed to follow did not involve the same ratemaking treatment for which Dominion contends, rested upon differing sets of facts, and did not actually control the manner in which Duke's coal ash-related costs were reflected in the companies' rates.

¶ 44 As a result, given that the Commission's ratemaking decisions involve the exercise of legislative authority and the fact that "only specific questions actually heard and finally determined by the Commission in its judicial character are res judicata, and then only as to the parties to the hearing," *Thornburg*, 325 N.C. at 468, we hold that the Commission did not err by focusing its analysis upon the nature and extent of the coal ash-related costs that Dominion sought to have included in the calculation of its North Carolina retail rates and that the Commission was not obligated to adopt the same ratemaking treatment for the costs at issue in this case that it adopted in the 2016 Dominion rate order and the 2017 Duke rate orders. For the same reason, the Commission did not violate the equal protection clauses of the state and federal constitutions by reaching a different result in this case than it did in the decisions upon which Dominion relies. Finally, we hold that the Commission adequately explained the basis for the decision that it actually made with respect to the issue of whether Dominion should have been allowed to earn a return upon the unamortized balance of the relevant coal ash-related costs. As a result, we hold that Dominion's challenge to the Commission's failure to allow it to earn a return on the unamortized balance of its coal ash-related costs did not involve any error of law.

C. Ten-Year Amortization Period

¶ 45 Secondly, Dominion argues that the Commission's determination that the coal ash-related costs at issue in this case should be amortized over ten years was arbitrary and capricious given that the Commission had determined in the 2016 Dominion rate case that a five-year period would be beneficial for both Dominion and ratepayers and that the Commission had failed to give an adequate explanation for its decision to use a ten-year, rather than a five-year, amortization period in this case. More specifically, Dominion argues that, "[w]hile it is true that the ten-year amortization period adopted by the Commission meets the

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coal ash-related costs should be reflected in Dominion's rates. In view of the fact that the Commission explained the reasons that it rejected Dominion's position and referenced the Duke Energy orders multiple times, we have difficulty seeing what additional clarity would have been provided to the Commission's order by the inclusion of language explicitly stating why it had not followed the result reached in the Duke Energy orders that were later overturned on appeal.

outer bounds of the standard it adopted for cancelled nuclear plants," "*only* a five-year amortization period would be consistent with the Commission's treatment of coal ash costs *and* nuclear abandonment costs," with the Commission having erred by failing to rely on more recent and applicable decisions "involving 'identical' coal ash costs" rather than earlier nuclear plant abandonment costs.

¶ 46 As we understand its brief, the logic upon which Dominion relies in asserting that the Commission erred by requiring the use of a ten-year, rather than a five-year, amortization period in this case is essentially identical to the logic upon which Dominion relied in arguing that the Commission erred by failing to permit it to earn a return on the unamortized balance of the relevant coal ash-related costs. In essence, Dominion argues that, since the Commission found a five-year amortization period to be reasonable in both the 2016 Dominion rate case and the 2017 Duke Energy rate cases and since, "[i]n contrast to this line of precedent, the Commission now prescribes a ten-year amortization period" without "explain[ing] why [it] previously adopted [a] five-year amortization period, for the same costs," the Commission's decision with respect to the length of the applicable amortization period is arbitrary and capricious.

¶ 47 The same logic that persuades us that the Commission did not err by declining to allow Dominion to earn a return on the unamortized balance of the company's coal ash-related costs persuades us that the Commission did not err by approving the use of a ten-year, rather than a five-year, period for the amortization of those costs. In addition to the fact that the record developed in this case differs from those developed in the other cases, the fact that the 2016 Dominion order expressly stated that it was not entitled to precedential effect, and the fact that the ratemaking treatment approved in the 2017 Duke rate cases was changed upon remand from our decision in *Stein*, we note that the Commission found that the use of a ten-year period struck a "more appropriate and fairer balance" than the use of either a longer or a shorter amortization period and the use of a ten-year amortization period was consistent with its "historical treatment of major plant cancellations." *Application of Va. Elec. and Power Co. for Auth. to Adjust and Increase Its Elec. Rates and Charges*, No. E-22, Sub 273, 73 N.C.U.C. Orders & Decisions 343, 355. Although the record would have also supported a decision to reach the result which Dominion believes to be appropriate, the Commission's choice of a ten-year, rather than a five-year, amortization period appears to have a reasonable basis in both the record and the Commission's findings. As a result, we hold that the Commission did not commit any error of law in approving the use of a ten-year, rather than a five-year, period for amortizing Dominion's coal ash-related costs.

III. Conclusion

¶ 48 After a careful review of the entire record, we conclude that the Commission's order is supported by competent, substantial evidence and that the Commission adequately explained the basis for the portions of its decision that Dominion has challenged on appeal. As a result, the Commission's decision is affirmed.

AFFIRMED.

Justice BARRINGER dissenting.

¶ 49 The issue I address today is whether the Utilities Commission needed to explain why it departed from its reasoning in two cases that were decided less than two years prior, had materially similar facts, and were brought to the Commission's attention. While I agree with much of the majority's discussion of this case, I cannot accept its holding that the Commission did not even need to acknowledge the two Duke Energy (Duke) cases relied upon by Dominion Energy (Dominion) when Dominion requested a rate increase. Under general tenets of administrative law, an agency's failure to explain a departure from recent, applicable past decisions when they were brought to its attention is arbitrary and capricious. North Carolina administrative law should be no different. Otherwise, an agency can treat two similarly situated entities differently without having to directly explain why. Such arbitrary and capricious decision-making will only serve to undermine trust in our government. The matter should be remanded to address the issue discussed herein. Accordingly, I respectfully dissent.

I. Relevant Facts

¶ 50 On 29 March 2019, Dominion Energy applied to the Commission for a general rate increase. *Application of Va. Elec. & Power Co., d/b/a Dominion Energy N.C. for Adjustment of Rates and Charges Applicable to Elec. Serv. in N.C.*, Docket No. E-22, Sub 562 & Sub 566, slip op. at 3 (N.C.U.C. Feb. 24, 2020).[1] As part of the rate increase, Dominion sought to recover CCR compliance expenses incurred from 1 July 2016 to 30 June 2019 through a five-year amortization period as well as a return on the unamortized balance. *Id.* at 86. Dominion requested this recovery method as the Commission had allowed it in three prior decisions, one involving Dominion in 2016 and two involving Duke in 2018. The

1. Currently available at: https://starw1.ncuc.gov/NCUC/ViewFile.aspx?Id=7c1dc9e1-1bdb-4840-8692-6b329c980225.

Commission, however, denied Dominion's request, instead allowing it a ten-year amortization period and no return on the unamortized balance. *Id.* at 15. As the Public Staff concedes, at no point in the order did the Commission explain what distinguished Dominion's case from the two Duke cases, even though both had materially similar facts.

II. Analysis

¶ 51 Dominion Energy contends that the Commission's failure to provide any explanation directly addressing why it did not allow Dominion the same recovery as Duke was arbitrary and capricious. In response, the Public Staff argues that while "the Commission did not expressly distinguish those orders . . . the Commission's extensive explanation" for why it did not allow Dominion Energy a five-year amortization period and a return on coal costs "provided an adequate explanation for why it broke with the different policy that it had adopted in the 2018 Duke orders." Additionally, the Public Staff contends that even if the Commission erred by failing to expressly distinguish the Duke cases, remand would serve no purpose since this Court reversed the Duke orders in *State ex rel. Utilities Commission v. Stein*, 375 N.C. 870 (2020).

¶ 52 The Commission does not have "unbridled discretion in exercising its judgment." *State ex rel. Utils. Comm'n v. Thornburg*, 314 N.C. 509, 516 (1985). Instead, this Court may reverse a decision of the Commission if it is arbitrary or capricious. N.C.G.S. § 62-94(b)(6) (2021). "To be arbitrary and capricious, the Commission's order would have to show a lack of fair and careful consideration of the evidence or fail to display a reasoned judgment." *State ex rel. Utils. Comm'n v. Piedmont Nat. Gas Co.*, 346 N.C. 558, 573 (1997).

¶ 53 After careful review, I cannot find a case where this Court has addressed whether or not the Commission must explicitly explain why it departed from a recently decided case with materially similar facts that was brought to its attention. However, this Court has previously recognized that "[w]hile the Commission is not covered by our Administrative Procedure Act[,] . . . the Commission is still an administrative agency of the state government, and general tenets of administrative law are applicable to its operation except where modified by statute." *State ex rel. Utils. Comm'n v. Nantahala Power & Light Co.*, 326 N.C. 190, 199–200 (1990). Looking to the general tenets of administrative law, "[i]t is textbook administrative law that an agency must provide[ ] a reasoned explanation for departing from precedent or treating similar situations differently." *New England Power Generators Ass'n, Inc. v. Fed. Energy Regul. Comm'n*, 881 F.3d 202, 210 (D.C. Cir. 2018) (second alteration

in original) (quoting *W. Deptford Energy LLC v. FERC*, 766 F.3d 10, 20 (D.C. Cir. 2014)); *Trump Plaza Assocs. v. NLRB*, 679 F.3d 822, 827 (D.C. Cir. 2012) (noting that an agency "cannot 'ignore its own relevant precedent but must explain why it is not controlling[,]' *B B & L, Inc. v. NLRB*, 52 F.3d 366, 369 (D.C. Cir. 1995)"); *see also* 2 Am. Jur. 2d Admin. Law § 360 (2022).[2] Accordingly, though an administrative agency "need not address every precedent brought to its attention, it must provide an explanation where its decisions appear to be 'on point.' " *Nat'l Weather Serv. Emps. Org. v. Fed. Lab. Rels. Auth.*, 966 F.3d 875, 883–84 (D.C. Cir. 2020) (quoting *Brusco Tug & Barge Co. v. NLRB*, 247 F.3d 273, 277 (D.C. Cir. 2001)).

¶ 54 Here, the Commission never explained why, in this case, it allowed a different recovery for Dominion's CCR costs than the recovery it allowed for Duke's CCR costs two years prior.[3] In the Duke cases, the Commission allowed Duke to recover its CCR costs through a five-year amortization period and receive a return on the unamortized costs. In contrast, in this case, the Commission only allowed Dominion to recover its CCR costs through a ten-year amortization period and not receive a return on the unamortized costs. The Commission's order in this case contained several reasons explaining why it allowed a ten-year amortization period with no return on the unamortized costs. However, none of those *reasons* relate to the Duke cases or explain why the Commission departed from the Duke cases.[4]

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2. While these decisions are not from this Court, they interpret the words "arbitrary" and "capricious" in the context of administrative law, specifically the federal Administrative Procedure Act (APA). Like N.C.G.S. § 62-94(b)(6), the APA instructs federal courts to reverse agency actions that are arbitrary and capricious. *Compare* 5 U.S.C. § 706(2)(A), *with* N.C.G.S. § 62-94(b)(6) (2021). While the cases are not binding, given the similar statutory language and context, their interpretation is persuasive. *See, e.g.*, *Reynolds Am. Inc. v. Third Motion Equities Master Fund Ltd*, 379 N.C. 524, 2021-NCSC-162, ¶ 7 ("[G]iven the well-developed body of law arising from the numerous appraisal cases decided in Delaware, we borrow freely from these cases to the extent we find their reasoning to be persuasive and applicable to the facts here.").

3. In contrast, the Commission explicitly explained why it allowed a different recovery in this case than in the 2016 Dominion case. *Application of Va. Elec. & Power Co., d/b/a Dominion Energy N.C. for Adjustment of Rates and Charges Applicable to Elec. Serv. in N.C.*, Docket No. E-22, Sub 562 & Sub 566, slip op. at 122–23 (N.C.U.C. Feb. 24, 2020). Specifically, the Commission noted that the 2016 case did "not have precedential value" and that the evidence presented in the 2016 case was "far less extensive" than the evidence in this case. *Id.*

4. The order only mentions the Duke cases in two sections. First, in its findings of fact, the Commission found that "Duke Energy Carolinas, LLC (DEC), and Duke Energy Progress, LLC (DEP)" have an "authorized rate of return on common equity" of "9.90%." *Id.* at 8–9. The Commission then included a citation for the two 2018 Duke cases. *Id.* at 9 n.3. As part of the citation, the Commission included the subsequent history of the Duke

¶ 55 Since ratemaking is a legislative function and traditional principles of stare decisis do not apply, it was permissible for the Commission to allow a different recovery method in this case than in the Duke cases. However, when departing from the Duke cases, under general tenets of administrative law, the Commission needed to provide some explanation directly addressing why it departed when the Duke cases were similar, recently decided, and brought to the Commission's attention.[5] The Commission's failure to provide that explanation rendered its order arbitrary and capricious.

¶ 56 Further, contrary to the Public Staff's contention, reversing this case for the Commission to correct its erroneous reasoning would not be "futile." According to the Public Staff, since *Stein* reversed the two Duke cases, "there is now no need for the Commission to distinguish the ratemaking treatment that it afforded Duke that was later reversed and

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cases in accordance with Bluebook rule 10.7.1(a). *See The Bluebook: A Uniform System of Citation* R. 10.7.1(a), at 110 (Columbia L. Rev. Ass'n et al. eds., 21st ed. 2020). In other words, within the citation to the DEC case, the Commission properly included the clause "*appeal docketed*, No. 401A18 (N.C. Nov. 7, 2018)," and within the citation to the DEP case the Commission properly included the clause "*appeal docketed*, No. 401A18 (N.C. Nov. 7, 2018)" which were required by Bluebook Rule 10.7.1(a) because the cases were on appeal at that time. *Application of Va. Elec. & Power Co.*, slip op. at 9. These citation clauses are the only mention of the Duke cases being on appeal in the entire order. Therefore, it cannot seriously be maintained that these two clauses, in a citation, in a footnote, constitute adequate discussion of the Commission's reasons for failing to follow the prior Duke Energy orders. The cases were cited for the authorized rate of return on common equity allowed Duke Energy, not to explain why the Commission did not follow their treatment of CCR costs. At best, the mention of the appeals in the citations represents admirable attention to the Bluebook by the Commission.

Second, the Commission provided "a summary of the evidence that is in the record," which included the opposing arguments of the Public Staff and Dominion's witnesses concerning how the Commission should apply the Duke cases. *Id.* at 85–86, 99, 105–06, 114–15, 117. In its analysis, the Commission also referenced some exhibits that appeared in the Duke cases, *id.* at 124 & n.22, 127–29, and recognized that Dominion claimed it was entitled to a return on CCR costs because of the Duke cases, *id.* at 133. However, the order never actually addressed which of the arguments concerning the Duke cases the Commission found persuasive or explained why the Commission chose not to follow the Duke cases. *Id.* at 121–44. Thus, on appeal, this Court can only speculate as to why the Commission declined to follow the Duke cases.

5. Notably, in each of the 2018 Duke cases, the Commission explicitly discussed the 2016 Dominion case when explaining why it allowed the Duke utilities to recover their CCR costs through a five-year amortization period with a return on the unamortized costs. *See In re Joint Application by Duke Energy Progress, LLC, and Duke Energy Carolinas, LLC, for Accounting Order to Defer Environmental Compliance Costs*, Docket No. E-2, Sub 1103, 2018 N.C. PUC LEXIS 105, at *499–501 (N.C.U.C. Feb. 23, 2018); *In the Matter of Joint Application by Duke Energy Progress, LLC, and Duke Energy Carolinas, LLC, for Accounting Order to Defer Environmental Compliance Costs*, Docket No. E-7, SUB 1110, 2018 WL 3209374, at *264 (N.C.U.C. June 22, 2018).

superseded." However, this argument only highlights the problem with the Commission's decision in this case. Without an explanation from the Commission, this Court has no basis for knowing why the Commission chose not to follow the Duke cases. Thus, this Court can only speculate as to what effect *Stein* would have on the Commission's reasoning in this case.

¶ 57 More importantly, at the time the Commission decided this case, *Stein* had not yet been decided by this Court. Thus, the Commission must have chosen to depart from the Duke cases for some reason other than *Stein*. Accordingly, the partial reversal of the Duke cases in *Stein* and their ultimate settlement does not provide this Court with any further insight as to why the Commission chose not to follow them or permit us to conclude that its decision to depart from the Duke cases was not arbitrary and capricious.

¶ 58 Ultimately, the lack of an explanation by the Commission is the fatal flaw in this case. While nonarbitrary explanations for why the Commission treated one utility differently than another utility certainly could exist,[6] so could arbitrary ones. For instance, the Commission might arbitrarily treat out-of-state-based utilities differently than locally based ones due to a bias towards local businesses. Unless the Commission had to directly explain why it treated two similarly situated utilities differently, it could hide biased, arbitrary decision-making through the release of reasonable but unrelated explanations in each case. The risk that some businesses will be treated differently than others, without a guarantee that they will receive an explanation as to why they are treated differently, will only undermine trust in our government and prevent us from reviewing the Commission's decisions to ensure they are not arbitrary and capricious. *See*, *e.g.*, *State ex rel. Utilities Comm'n v. Stein*, 375 N.C. 870 (2020) (Newby, J., concurring in part and dissenting in part); *In re Harris Teeter, LLC*, 378 N.C. 108, 2021-NCSC-80 (Berger, J., dissenting); *id.* (Barringer, J., dissenting). General tenets of administrative law would not permit such a situation, but apparently, the majority is willing to adopt a different standard, a standard that will now govern all utilities who wish to conduct business in North Carolina.

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6. For instance, the majority notes that the Duke utilities were assessed substantial mismanagement penalties in the 2018 cases while Dominion incurred no such penalty in this case. Again, however, this Court has no way to determine whether the mismanagement penalty was a factor in the Commission's decision to depart from the Duke cases. After all, the substantial mismanagement penalty referenced by the majority escaped the attention of the Public Staff who, on appeal, did not suggest it as a possible reason for distinguishing the Duke cases from the present case.

III. Conclusion

¶ 59 An agency's decision is arbitrary and capricious if it does not explain why it decided to depart from two cases decided less than two years prior that featured materially similar facts and were brought to its attention. The majority's decision to the contrary now permits the Commission to treat two similarly situated entities differently without ever having to directly address the reason for the disparate treatment. The majority's decision on this point contradicts general tenets of administrative law. Because this case should be remanded to the Commission to address the issue discussed herein, I respectfully dissent.

Chief Justice NEWBY and Justice BERGER join in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
DAVID MYRON DOVER

No. 298A21

Filed 17 June 2022

Homicide—sufficiency of evidence—reasonable inference—circumstantial evidence—large sum of cash

There was sufficient evidence to withstand defendant's motion to dismiss the charges of robbery with a dangerous weapon and first-degree murder where, among other things, defendant was a crack cocaine addict who had frequently borrowed cash from the victim and others, the victim had been known to carry large sums of cash, investigators found no money in the victim's residence, defendant lacked legitimate financial resources, defendant had approximately $3,000 of cash in a concealed location after the murder, cell phone records showed that defendant was in the vicinity of the victim's residence on the night of the murder, there was no sign of forced entry into the victim's residence, defendant indicated before the victim's body was discovered that he knew the victim would not be returning to work, defendant made false and contradictory statements to the police, and defendant had deleted all of the call and text message history from his phone up until the morning that the victim's body was found. Defendant had the motive, opportunity, and means to commit the crimes.

Justice HUDSON dissenting.

Justice EARLS joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 278 N.C. App. 723, 2021-NCCOA-405, reversing the trial court's denial of defendant's motion to dismiss and vacating a judgment entered on 19 September 2019 by Judge Richard S. Gottlieb in Superior Court, Rowan County. Heard in the Supreme Court on 9 May 2022.

Joshua H. Stein, Attorney General, by Benjamin Szany, Assistant Attorney General, for the State-appellant.

Marilyn G. Ozer for defendant-appellee.

NEWBY, Chief Justice.

¶ 1 This case requires us to determine whether the trial court properly denied defendant's motion to dismiss the charges of robbery with a dangerous weapon and first-degree murder. When considering a motion to dismiss, the trial court must determine whether there is substantial evidence of each element of the offense and whether the defendant was the perpetrator of the offense. If substantial evidence supports a reasonable inference of each element and that the defendant committed the crime, then the motion to dismiss should be denied. Here substantial evidence supports the reasonable inference that defendant murdered the victim and took $3,000. Accordingly, the trial court properly denied defendant's motion to dismiss. We reverse the Court of Appeals' decision and remand to the Court of Appeals for consideration of defendant's remaining argument.

¶ 2 In considering a defendant's motion to dismiss, we look at the facts in the light most favorable to the State. At the time of his "sudden, unexpected, and violent death," Arthur "Buddy" Davis was seventy-nine years old. Though he "had a few health problems," Mr. Davis was generally in good health for his age. He was "[w]onderful, kind, generous, soft-spoken, [and] very considerate." Every morning, Mr. Davis spoke with his two adult daughters. Every night before bed, Mr. Davis would call each of his daughters and sing them "a good-night song." He lived in a single-wide trailer at 2000 Chris Ann Lane in Kannapolis. One of his daughters, Charlotte, lived in a trailer "right beside" him with her

husband, Waylon Barber (Barber). Mr. Davis had worked selling "cars all his life . . . since before [his daughters] w[ere] born." Mr. Davis first met Terry Bunn (Terry), the owner of Terry's Auto Sales in Kannapolis, at a car auction well before the events in this case. After Terry opened the business, Mr. Davis began working at Terry's Auto Sales as a salesman.

¶ 3 At Terry's Auto Sales, Mr. Davis did "a whole lot of things that w[ere] done around the office. He took care of answering . . . the phones. When [Terry] wasn't there . . . [Mr. Davis] was the one in charge. . . . [W]hatever the office needed is what [Mr. Davis] did." Mr. Davis often "went with [Terry] to the [car] sales," where they "picked out what [cars they] wanted" to buy to be resold at Terry's Auto Sales. If Terry found a car at the auction that he wanted to buy but did not have the money, then Mr. Davis would loan Terry the money to purchase the car and Terry would pay him back with interest. When Mr. Davis "would go to these sales and . . . purchase a car," "he carried a lot of cash on him." Mr. Davis would carry the cash "folded over and usually in his front pocket," and "[h]e had places in his billfold that he had money" as well. One time when Terry borrowed money from Mr. Davis to buy a motorcycle, Mr. Davis "pulled money out of every corner of his billfold."

¶ 4 At the time, defendant was the only employee at Terry's Auto Sales other than Mr. Davis. Defendant started working for Terry's Auto Sales as a mechanic in the fall of 2015. He repaired cars in the garage attached to the office, typically earning $300 or $400 per week. In December of 2015, defendant was placed on probation. At that time, defendant lived in a motel. Eventually, he moved in with his girlfriend, Carol Carlson, who was also on probation and lived at 130 Haven Trail in China Grove across the street from her mother. Though defendant was "a good employee[and] a very good mechanic," defendant had substance abuse issues that began to worsen.

¶ 5 While defendant was on probation, he tested positive twice for illegal substances, resulting in his probation officer referring him to a substance abuse and mental health treatment center. Terry, who had known defendant for almost twenty years and worked with him previously, noticed that defendant lost a significant amount of weight and his attitude shifted. A waitress at Lane Street Grill, the restaurant that defendant, Mr. Davis, and Terry visited for breakfast "about every day, five days a week," also noticed that defendant "looked like he was wired up a lot more," that "[h]is personality changed a little bit," and that "deep down he just wasn't the same." After the waitress asked defendant to repay twenty dollars he owed her, defendant stopped coming to the restaurant and never repaid the money. Eventually, Mr. Davis repaid the waitress

on defendant's behalf. Moreover, by February of 2016, defendant owed more than $2,000 in court costs and probation supervision fees.

¶ 6 Defendant also borrowed money from Terry, "[s]ometimes . . . every afternoon . . . especially later on." Eventually, defendant was "borrow[ing] more money than he had coming to him," but Terry still let him borrow money. A few weeks before Mr. Davis's death, Terry caught defendant returning parts that belonged to the company and keeping the money without permission. Terry almost fired defendant, but Mr. Davis "talked [Terry] out of it" because the shop "needed a mechanic." Defendant also borrowed money from Mr. Davis, which "was pretty much a regular thing, too, that [defendant] would ask, and . . . almost every time [Mr. Davis] . . . did let him borrow the money." A few days before his death, Mr. Davis "had just gotten mad about" defendant borrowing money and refused to loan more money to defendant. According to defendant, even though Mr. Davis sometimes stopped loaning him money, Mr. Davis would eventually still give defendant more money.

¶ 7 In late April of 2016, a customer named Murphy Sauls (Sauls) asked defendant to repair the transmission in his Oldsmobile Cutlass. Defendant agreed to repair the car for $700. Sauls's friend paid defendant $400 on 22 April 2016 as a partial payment for the work. Defendant replaced the transmission in Sauls's Oldsmobile with a transmission from an Oldsmobile which belonged to Terry's Auto Sales. After working on the car for a few weeks, defendant called Sauls on Saturday, 7 May 2016 and "said [the] car was ready." Defendant then "picked [Sauls] up at home, took [him] to the bank, [and Sauls] withdrew [$]300 and gave it to [defendant]," fully paying for the repair. Then, on Sunday, 8 May 2016, defendant borrowed twenty dollars from Mr. Davis again, even though Mr. Davis had recently refused to loan defendant more money.

¶ 8 The next day, Monday, 9 May 2016, Mr. Davis brought out his chainsaw around 4:00 p.m. to help his son-in-law, Barber, cut a tree limb that had fallen during a storm. Meanwhile, that evening defendant borrowed another "[$]30 or $40 from [Terry] . . . and told [Terry] that he was going to collect on that transmission job that night," despite having already collected that money from Sauls just two days earlier. Thus, defendant "told [Terry] he would have $300 for [Terry] the next morning." Defendant was also three months behind on his power bill, and his electric service was going to be terminated the next day. After speaking with Terry, defendant continued his mechanic work at the dealership. That evening, while Barber was working on his wife Charlotte's Jeep by himself, defendant "rode by a couple times." The last time, around 9:00 p.m. after it was dark, defendant stopped and "asked [Barber] what was wrong with the

Jeep." When Barber went back inside around 9:35 p.m., Charlotte was talking to Mr. Davis on the phone as she did every night. Mr. Davis called his daughter April as well and "sang [her] a song good night." Mr. Davis "was supposed to come over [to April's home] at 7:00 [a.m.] the next morning" to give April money.

¶ 9 Records of the calls defendant made from his cell phone showed that between 9:46 p.m. and 10:23 p.m., defendant made several phone calls from the area of his home at 130 Haven Trail in China Grove. Then, between 11:22 p.m. and 11:32 p.m., defendant made several more phone calls from the area that included Mr. Davis's residence and Terry's Auto Sales. Two of defendant's calls during this time, at 11:31 p.m. and 11:32 p.m., were to Mr. Davis's phone. Defendant concealed his phone number when he made these two calls. Defendant later told investigators he "called [Mr. Davis] two or three times" that night, but Mr. Davis never picked up. Defendant wanted to borrow twenty dollars from Mr. Davis.

¶ 10 Later that evening, between 10:00 p.m. and 12:00 a.m., defendant went to the home of Walter Holtzclaw (Holtzclaw), a known drug dealer, at 3052 Clermont Avenue to buy drugs. Defendant's phone records showed he made calls from the area of Holtzclaw's home at 12:11 a.m. and 12:12 a.m. During this visit, defendant paid twenty dollars for "[a] dime of crack" and "was looking for a woman." Defendant was dressed "[i]n mechanic clothes" and was "very filthy, oily and greasy, like somebody maybe pulled him out of a grease pit." Holtzclaw told defendant he would not "give [defendant a woman] the way he was looking." Defendant left and eventually returned to his home, making several phone calls from the area of his home between 12:49 a.m. and 1:30 a.m. Defendant then came back to Holtzclaw's home around 2:00 a.m., and "got 40 or 50 [dollars] worth" of drugs. Defendant "had cleaned up and everything" and was wearing casual clothes, with no blood or other stains and had a "whole handful of bills" in his hand. After leaving, defendant returned to Holtzclaw's house a third time around 6:00 a.m. with his girlfriend, Carol, and bought another twenty dollars of drugs.

¶ 11 Mr. Davis's daughter, April, became concerned when he was not at her house at 7:00 a.m. that morning, and she started calling him repeatedly. Mr. Davis did not answer the phone. After about an hour passed, April called Terry's Auto Sales to check if Mr. Davis was at the car lot. Defendant answered the phone, and April, recognizing defendant's voice, had the following exchange with defendant about her father:

> [April:] I said—I answered the phone. I said, ["] Can I speak to [Mr. Davis]?["]

> The man said, ["]Who the hell is this?["]
>
> I said—I said, ["]This is April, his daughter. That's who the hell I am.["]
>
> And then he goes, ["]Well, he isn't F-ing here anymore.["]
>
> And then I said, ["]What do you mean he isn't here?["] And then hung up the phone—he hung up the phone.

April then called her sister, Charlotte, who was already on her way to April's house and had not heard from their father either. Concerned, Charlotte then called her husband, Barber, and asked him to go check on Mr. Davis. By the time Barber arrived at Mr. Davis's trailer, Terry Bunn had already found Mr. Davis and called 911.

¶ 12 When Mr. Davis had not come to work that morning, Terry grew concerned that perhaps Mr. Davis "was sick or, you know, was having some problems, so [Terry] went to [Mr. Davis's] house" to check on him. When Terry arrived at Mr. Davis's house, the door to Mr. Davis's trailer was locked, and there were no signs of forced entry. Mr. Davis did not answer, so Terry picked up "a flat screwdriver, and [he] slid it in behind the door . . . [and] just jimmied the door open." There were "obvious signs of some type of struggle in the living room, some stuff knocked off of shelves, knocked over, pushed—furniture pushed at a different angle where you can tell that it wasn't put there on purpose." Blood droplets led from the living room to the kitchen, where "a lot of blood" had puddled on the linoleum floor and spattered around the kitchen, with some landing on an organ nearby. Looking around, Terry then saw Mr. Davis's "feet sticking out of . . . the bedroom." "[I]t looked like Mr. Davis, after he had been attacked, had tried to get to the back bedroom to get to a phone to call for some help."

¶ 13 Mr. Davis's body was "leaning more towards his right side on the floor" and was "propped against the side of the bed." Mr. Davis had "[fourteen] stab wounds on his chest, abdomen, and back." One stab wound on Mr. Davis's back "went through the muscles between two of the ribs along the spine, but not into the spine, and hit the heart." Another stab wound injured Mr. Davis's "right lung with some bleeding into the chest cavity." Several more stab wounds on Mr. Davis's lower chest and the right side of his body injured Mr. Davis's diaphragm and liver. Mr. Davis also had shallow cuts on several parts of his body, including his lips, both sides of his neck, his left hand, his left armpit and his

right forearm. Mr. Davis's cause of death was "listed as multiple sharp force injuries" due to the stab wounds that injured several major organs. None of the stab wounds "hit any of the major blood vessels . . . so blood was [not] going to go spurting out or anything like that, but it is going to bleed." When Mr. Davis was unresponsive, Terry called 911 and then saw Barber come in the trailer. Law enforcement arrived shortly thereafter.

¶ 14 That same day, after talking with Terry and Mr. Davis's relatives and canvassing the neighborhood for any witnesses, investigators with the Kannapolis Police Department wanted to speak with defendant "because he actually worked with the deceased. . . . [They] had already talked to Terry Bunn, so [they] wanted to talk to the next person that worked with [Mr. Davis]." Investigators were looking for "drug users who knew [that Mr. Davis] had money." Defendant's probation officer informed investigators that defendant was at Rowan Helping Ministries, the local homeless shelter that also assists people with utility bills. Defendant was seeking help because he "was three months behind on the power bill" and "[t]hey w[ere] going to cut [the] power off." In a later interview with a detective, defendant said, "That . . . hurts. I'm [fifty-three] years old, and I've got to ask somebody to pay my power bill."

¶ 15 After defendant left Rowan Helping Ministries, officers at defendant's house then saw him "pull in, driving. They knew that he was . . . driving while [his] license [was] revoked." A warrant for defendant's arrest was obtained based on defendant's driving while his license was revoked, but service of that warrant "was held off." During the evening of 10 May 2016, Detective Lemar Harper with the Kannapolis Police Department "drove over to [defendant's] residence" to speak with defendant. Defendant knew of Mr. Davis's death, but his girlfriend Carol "was shocked because she didn't know that [Mr. Davis] had died. [Defendant] never told her," which Detective Harper thought was odd. After Detective Harper spent approximately twenty minutes at defendant's residence, defendant voluntarily agreed to go to the police station and speak with Detective Harper about the investigation. As they left, Detective Harper watched as defendant "reached into his pocket, [and] gave his girlfriend $20 from his pocket. It appeared he had about $50 on him at the time. . . . [Detective Harper] thought it was odd at the time because [they] knew already that [defendant] was struggling with money, always asking to [borrow] money."

¶ 16 Detective Harper interviewed defendant at the police station beginning around 9:30 p.m. on 10 May 2016. Defendant told Detective Harper that he "got home around between 8:00 [p.m.] and 9:00 [p.m.] . . . [and] stayed home the rest of the night." Defendant claimed that after he

"stopped and talked to [Barber]" around dusk, "he went back to the car lot, checked the fluids" of the car he was test-driving, then made one other stop and went home. Defendant also told Detective Harper that he "tried to call [Mr. Davis] yesterday after [defendant] got home," which was "probably right around 10 o'clock." Defendant "wanted to borrow $20" from Mr. Davis. When Detective Harper asked defendant about the money defendant had given to Carol earlier, defendant took money from his pocket and showed Detective Harper thirty-one dollars. Detective Harper "want[ed] to know about where [defendant] got [the] money."

¶ 17 Defendant tried to explain that the money came from Sauls for the work on the transmission in his Oldsmobile, but defendant emphasized that "[i]t's Terry's money" because defendant still had to repay the money Terry previously loaned him. Defendant claimed that Sauls paid him "about $400" that morning and that "Terry was expecting money that day from him," but defendant "kept changing" the amount. Defendant also claimed that, while it was daylight on 9 May 2016, "[h]e went and got [a] dime of crack cocaine and brought it back to Terry's car lot . . . and smoked it there." Detective Harper said he "wanted to corroborate [defendant's] story and wanted to look at [defendant's] cell phone in order to try to do that." Defendant responded, "I don't give a damn . . . I don't care, I don't care" and gave Detective Harper his phone. Information from defendant's phone could not be retrieved using the police department's "mobile forensic device" due to the age of defendant's phone. Instead, investigators manually searched the call log and text message history. Detective Harper "noticed that there weren't any calls in the call history besides after we picked up [defendant] for him to come to the police department." Other than "one text message in there from 10 o'clock from Carol," the text messages were also gone.

¶ 18 Later that night around 11:00 p.m., defendant "went out to the parking lot" after the interview ended. While defendant was "waiting for [officers] to give him a ride back home," defendant "got arrested for that . . . driving while license revoked" charge. Defendant declined to be interviewed a second time. The next morning, while defendant was in custody, he called his girlfriend, Carol, on a recorded line to which investigators were listening. Defendant first asked Carol where she was, and Carol said that she was at home. Defendant and Carol then discussed as follows:

> Carol: They want a thousand dollars.
>
> Defendant: Well, look . . . don't take the trash out. Listen to me . . . has the—

Carol: Okay.

Defendant: —has the police been back there?

Carol: No.

Defendant: Hey, can you get a bondsman to come and get me?

Carol: I guess, but I don't got money.

Defendant: I'm fixing to tell you where some's at.

Carol: Okay.

. . . .

Defendant: Listen to me, go out there—

Carol: Okay.

Defendant: —in the trashcan, the . . . trashcan.

Carol: The big one?

Defendant: The one at the damn steps. Got it?

Carol: Okay.

Defendant: Alright.

Carol: Yeah.

Defendant: In the big black bag that's in the bottom—

Carol: Okay.

Defendant: —they's a McDonald's bag in there inside that McDonald's bag they's a glove . . . .

. . . .

Defendant: Look, in that McDonald's bag there's three thousand dollars in a glove, okay?

Carol then searched through the trashcan for the money. Defendant said the money was "rolled up real tight and round." Carol found the money and stated, "I got it." Then defendant said, "Come and get me immediately," to which Carol responded, "I'm coming to get you right now . . . I'm gonna have Lucky come bring me."

¶ 19 After hearing defendant's phone call to Carol, officers "immediately went out there to try to intercept Carol and the money." Two officers

went to the jail "to see if [they] could catch up to [Carol]." When they arrived, Carol was inside and agreed to voluntarily speak to the officers. Carol was "[e]xtremely jittery" and "talkative, talkative, talkative." When asked about the money, Carol admitted that she had it and told the officers she paid $1,000 to the bail bondsman and that the remainder of the money was in her purse. The officers then retrieved $1,724 from her purse. The money paid to the bail bondsman was also retrieved.

¶ 20 Meanwhile, Detective Harper and another officer searched the trashcan outside the home of Carol's mother and "found the rolled up, empty McDonald's bag, except that there was a glove inside that was empty." When further investigation into defendant's phone records revealed he had not stayed at home as he told Detective Harper, officers arrested him for first-degree murder and robbery with a dangerous weapon on 12 May 2016. On 16 May 2016, a grand jury returned true bills of indictment against defendant for first-degree murder and robbery with a dangerous weapon.

¶ 21 Defendant's trial began on 9 September 2019. Defendant moved to dismiss the charges at the close of the State's evidence and renewed the motion to dismiss at the close of all the evidence, arguing that the evidence was insufficient to prove defendant was guilty of both first-degree murder and robbery with a dangerous weapon. Defendant contended that "there is no direct tie between that particular money and . . . where it came from. . . . There was . . . nothing to trace it back to being specifically Mr. Davis's money." Further, defendant argued that "it's completely circumstantial at that point that there's an actual link with that much money." The trial court denied the motions to dismiss. The trial court also denied defendant's motion for a mistrial, which was based on statements the State made as part of its closing argument. On 19 September 2019, the jury found defendant guilty of robbery with a dangerous weapon and first-degree murder based on "malice, premeditation, and deliberation" and "on the basis of [the] first[-]degree felony murder rule on the basis of robbery with a dangerous weapon." The trial court sentenced defendant to life imprisonment without parole on the first-degree murder charge and arrested judgment on the robbery with a dangerous weapon charge. Defendant appealed to the Court of Appeals.

¶ 22 At the Court of Appeals, defendant argued the trial court erred by denying his motion to dismiss. *State v. Dover*, 278 N.C. App. 723, 2021-NCCOA-405, ¶ 19. Specifically, defendant argued that " '[t]he State failed to present any evidence that [Defendant] entered the trailer of [Mr. Davis] and committed murder' and '[t]he State failed to present any evidence connecting [the $3,000.00 in cash] with [the victim].' " *Id.* ¶ 23

(alterations in original). Defendant also argued that the trial court should have granted his motion for a mistrial because portions of the State's closing argument were improper. *Id.* ¶ 30. A divided panel of the Court of Appeals agreed with defendant that the trial court erred by denying his motion to dismiss. *Id.* ¶ 22.

¶ 23 In its analysis, the Court of Appeals first recounted "[t]he evidence favorable to the State," which established that

> [d]efendant lied to the police and changed his story as to his whereabouts on the night of the murder; cell tower records placed [d]efendant in the same vicinity as Mr. Davis's mobile home on the night of the murder; [d]efendant deleted his cellphone call and text messaging history; there was no forced entry in Mr. Davis's mobile home, suggesting he knew the perpetrator; the fact that [d]efendant was in possession of $3,000.00 in cash with no explanation of where it came from; Mr. Davis's wallet and any cash he may have had were missing from his mobile home; [Terry]'s testimony that Mr. Davis usually "carried a lot of cash on him" and kept cash in his wallet; Mr. Davis planned to meet his daughter the morning after the murder to bring her money; [d]efendant's continued asking to borrow money from Mr. Davis; and Mr. Davis told [d]efendant a few days before his death he refused to loan [d]efendant any more money.

Id. ¶ 24 (footnote omitted). The Court of Appeals initially agreed with the State that "the jury could reasonably infer Mr. Davis had cash in his mobile home" because the evidence showed Mr. Davis planned to meet his daughter the next morning to give her money. *Id.* ¶ 25. Moreover, the Court of Appeals conceded that defendant "was in the general vicinity of the deceased's home at the time of the murder and that he made several arguably contradictory statements during the course of the police investigation." *Id.* ¶ 28 (quoting *State v. White*, 293 N.C. 91, 97, 235 S.E.2d 55, 59 (1977)).

¶ 24 The Court of Appeals thus conceded that the State had proven that "[d]efendant had an opportunity to commit the crime charged," *id.* ¶ 28 (quoting *White*, 293 N.C. at 97, 235 S.E.2d at 59), but also noted that "crucial gaps existed in the State's evidence," *id.* ¶ 27. Specifically, "[t]he State failed to link [d]efendant to the stolen cash" and failed to prove that the stolen money originated from Mr. Davis's mobile home. *Id.* Thus,

the Court of Appeals held that "the [r]ecord is insufficient to show more than a suspicion that [d]efendant murdered Mr. Davis and robbed him with a dangerous weapon." *Id.* ¶ 29. Accordingly, the Court of Appeals reversed the trial court's denial of defendant's motion to dismiss and vacated defendant's convictions. *Id.* ¶ 31. Because the Court of Appeals held that the charges against defendant should have been dismissed, it did not address defendant's argument that the trial court erred by denying his motion for a mistrial. *Id.* ¶ 30.

¶ 25 The dissent contended that the trial court did not err by denying defendant's motion to dismiss. *Id.* ¶ 32 (Arrowood, J., dissenting). The dissent emphasized that "the evidence 'need only give rise to a reasonable inference of guilt,' " *id.* ¶ 34 (quoting *State v. Turnage*, 362 N.C. 491, 494, 666 S.E.2d 753, 755 (2008)), which is true "regardless of whether the evidence is direct or circumstantial," *id.* Moreover, the dissent noted that when "considering circumstantial evidence, a jury may properly make inferences on inferences in determining the facts constituting the elements of the crime." *Id.* ¶ 35. The dissent argued "that the evidence of defendant's location, his possession of a large amount of cash, his history with the victim, and defendant's apparent concealment of evidence was sufficient to raise a reasonable inference that defendant was guilty of armed robbery and first-degree murder." *Id.* ¶ 39. Accordingly, the dissent would have affirmed the trial court's denial of defendant's motion to dismiss. *Id.*

¶ 26 Thus, the dissent also addressed defendant's argument regarding the trial court's denial of his motion for a mistrial. *Id.* ¶ 40. The dissent noted that while "defendant objected to the State's original phrasing [of the closing argument], defendant failed to object to the following statement" by the State. *Id.* ¶ 42. Thus, the dissent would have rejected defendant's argument that the trial court was required to issue a curative instruction regarding the State's statement following defendant's original objection. *Id.* Accordingly, the dissent would have held the trial court properly denied defendant's motion for a mistrial. *Id.* The State appealed to this Court based upon the dissenting opinion at the Court of Appeals.

¶ 27 The State argues that the trial court properly denied defendant's motion to dismiss because the State presented substantial evidence of each element of the offenses of first-degree murder and robbery with a dangerous weapon. Defendant, however, contends that the trial court erred by denying his motion to dismiss. Specifically, defendant argues that the "State failed to present any evidence connecting [the $3,000 of] cash with [Mr. Davis]." Thus, we must determine whether the trial court erred by denying defendant's motion to dismiss.

¶ 28 This Court reviews a trial court's denial of a motion to dismiss de novo. *State v. Blagg*, 377 N.C. 482, 2021-NCSC-66, ¶ 10 (quoting *State v. Golder*, 374 N.C. 238, 250, 839 S.E.2d 782, 790 (2020)). "In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *Id.* (quoting *Golder*, 374 N.C. at 249, 839 S.E.2d at 790). Substantial evidence only requires "more than a scintilla of evidence," *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982), or "the amount necessary to persuade a rational juror to accept a conclusion," *Blagg*, ¶ 10 (quoting *Golder*, 374 N.C. at 249, 839 S.E.2d at 790). "In evaluating the sufficiency of the evidence to support a criminal conviction, the evidence must be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom." *Id.* (quoting *Golder*, 374 N.C. at 249–50, 839 S.E.2d at 790). Moreover, "[a]ny contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered." *State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009) (citations omitted). "Courts considering a motion to dismiss for insufficiency of the evidence 'should not be concerned with the weight of the evidence.' " *Blagg*, ¶ 11 (quoting *Earnhardt*, 307 N.C. at 67, 296 S.E.2d at 652).

¶ 29 "The test of the sufficiency of the evidence to withstand the motion to dismiss is the same whether the evidence is direct, circumstantial[,] or both." *Earnhardt*, 307 N.C. at 68, 296 S.E.2d at 653. "[C]ircumstantial evidence is proof of a chain of facts and circumstances indicating the guilt or innocence of a defendant." *State v. Adcock*, 310 N.C. 1, 36, 310 S.E.2d 587, 607 (1984) (quoting 1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 15.02 (3d ed. 1977)). "There is no logical reason why an inference which naturally arises from a fact proven by circumstantial evidence may not be made." *State v. Childress*, 321 N.C. 226, 232, 362 S.E.2d 263, 267 (1987). Therefore, it is appropriate for a jury to make "inferences on inferences" when determining whether "the facts constitut[e] the elements of the crime." *Id.* Thus, "[c]ircumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *Blagg*, ¶ 11 (alteration in original) (emphasis omitted) (quoting *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988)).

¶ 30 Our case law also establishes "that false, contradictory or conflicting statements made by an accused concerning the commission of a crime may be considered as a circumstance tending to reflect the mental processes of 'a person possessed of a guilty conscience seeking to

divert suspicion and exculpate [himself].' " *State v. Walker*, 332 N.C. 520, 537, 422 S.E.2d 716, 726 (1992) (alteration in original) (quoting *State v. Myers*, 309 N.C. 78, 86, 305 S.E.2d 506, 511 (1983)). Thus, inconsistencies between "statements of [a] defendant and the evidence at trial . . . ha[ve] substantial probative force, tending to show consciousness of guilt." *Id.* at 538, 422 S.E.2d at 726 (internal quotation marks omitted). "Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy it beyond a reasonable doubt that the defendant is actually guilty." *Blagg*, ¶ 12 (quoting *State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (2000)).

¶ 31 Viewing the evidence in the light most favorable to the State, the evidence supports a reasonable inference that defendant took the $3,000 from Mr. Davis. Defendant contends that the money could have belonged to him originally and not to Mr. Davis because defendant "dealt only in cash and received cash payments directly from customers." The possibility of an inference supporting defendant's innocence, however, does not view the evidence in the light most favorable to the State. *See Miller*, 363 N.C. at 99, 678 S.E.2d at 594 ("[S]o long as the evidence supports a reasonable inference of the defendant's guilt, a motion to dismiss is properly denied even though the evidence also permits a reasonable inference of the defendant's innocence." (internal quotation marks omitted)).

¶ 32 Moreover, the evidence shows defendant lacked legitimate financial resources. Defendant began working for Terry's Auto Sales in the fall of 2015 and only earned $300 to $400 per week from his work. When defendant's probation began in December of 2015, he was living in a motel. By February of 2016, defendant owed more than $2,000 in court costs and probation fees. Defendant consistently borrowed money from other people, including Terry, Mr. Davis, and a waitress at the restaurant they frequented. When defendant could not repay twenty dollars that he borrowed from the waitress, he stopped going to the restaurant and Mr. Davis paid the waitress on defendant's behalf. Leading up to Mr. Davis's death, defendant borrowed money from Terry almost "every afternoon" and was "borrow[ing] more money than [defendant] had coming to him." Defendant was almost fired when Terry caught defendant returning parts that belonged to Terry's Auto Sales and keeping the money without permission. Defendant also regularly borrowed money from Mr. Davis, including just before Mr. Davis was killed.

¶ 33 Defendant admitted that he tried to call Mr. Davis the night Mr. Davis died because he "wanted to borrow $20" from Mr. Davis, even though Mr. Davis "had just gotten mad about" defendant asking to borrow money.

Defendant tried to borrow this money even though that same evening he had borrowed thirty or forty dollars from Terry. The only other money defendant had in the days before the crime was the $300 he received from Sauls as final payment for the repair on 7 May 2016. Defendant knew that final payment was "Terry's money" because the transmission defendant used originated from a car on Terry's lot. On the night of the murder, 9 May 2016, defendant falsely told Terry that "he was going to collect on that transmission job that night" and that after doing so "he would have $300 for [Terry] the next morning," implying that he no longer had the money from Sauls to give Terry but nonetheless would find a way to pay Terry.

¶ 34 When defendant first visited Holtzclaw's house around midnight, he only "had $20, and that's about all he spent." Defendant then returned to Holtzclaw's house around 2:00 a.m. with "a whole handful of bills" and "got 40 or 50 [dollars] worth" of drugs. Defendant returned to Holtzclaw's house a third time around 6:00 a.m. on 10 May 2016 and bought another twenty dollars of drugs. When speaking with Detective Harper the next day, defendant could not recall whether he owed Terry $300 or $400. Defendant also could not explain where he obtained the money he gave his girlfriend, Carol, before leaving his home or the thirty-one dollars on his person during the interview. Defendant tried to explain that Sauls had paid defendant $400 that morning, even though Sauls had actually paid him $300 several days earlier.

¶ 35 Further, on 10 May 2016, defendant went to Rowan Helping Ministries, where he was asking for help paying his power bill because he "was three months behind" and "[t]hey w[ere] going to cut [his] power off." Defendant told Detective Harper, "[t]hat . . . hurts. I'm 53 years old, and I've got to ask somebody to pay my power bill." During the same interview, defendant also said, "Everybody takes advantage of [Rowan Helping Ministries], but I need it." Thus, defendant himself acknowledged that he did not have lawfully obtained money to pay his power bill or his debt to Terry.

¶ 36 Moreover, defendant knew the exact location of the $3,000 in the trashcan, rolled up inside a glove, which was inside a McDonald's bag. Nonetheless, defendant chose not to use that money to pay his power bill or to repay his debt to Terry. Defendant's decision not to use this money supports the inference that defendant knew the money was stolen. Finally, defendant's lack of financial resources was fueled in part by his drug addiction, which worsened leading up to Mr. Davis's death and was noticed by those around him. Accordingly, substantial evidence supports the inference that the $3,000 did not originally belong to defendant.

¶ 37 Defendant also contends that, assuming the money did not belong to him, the evidence did not establish that Mr. Davis had possession of the $3,000 on 9 May 2016 before it was taken. The evidence, taken in the light most favorable to the State, established that Mr. Davis "carried a lot of cash on him." Mr. Davis carried enough money that when he went to car sales with Terry, Mr. Davis would occasionally loan Terry the money to purchase a car. Terry testified that Mr. Davis kept cash "folded over and usually in his front pocket" and in his wallet. Terry also testified that he once watched Mr. Davis "pull[ ] money out of every corner of his billfold." Mr. Davis's daughter, Charlotte, testified that she "would go out with [her] daddy shopping. [Her] daddy would take his wallet out. He would have money in it all the time." Charlotte also testified that she saw Mr. Davis "carry money rolled up." Moreover, Charlotte and April testified that Mr. Davis frequently gave people money. The next morning, April was expecting Mr. Davis to come to her home to give her money. Investigators never found Mr. Davis's wallet nor any money in his trailer, indicating it was stolen. When defendant told Carol the location of the money, defendant stated that the money was "rolled up real tight and round," just as Charlotte said Mr. Davis carried it. Accordingly, the evidence was sufficient to raise a reasonable inference that the $3,000 belonged to Mr. Davis the night he was murdered.

¶ 38 The evidence was also sufficient to raise a reasonable inference that defendant went to Mr. Davis's trailer that night. During his voluntary interview with Detective Harper on 10 May 2016 defendant said that he "got home around between 8:00 [p.m.] and 9:00 [p.m.]" and then "stayed home the rest of the night." The evidence, however, showed that defendant did not stay home that night. Defendant's phone records showed that he was in the area of his home in China Grove until at least 10:23 p.m. Around 11:30 p.m., defendant made phone calls from the area of Mr. Davis's residence and Terry's Auto Sales. Two of these calls were to Mr. Davis's phone. Shortly after midnight, defendant made phone calls from the area near Holtzclaw's home. Holtzclaw also testified that defendant came to his home between 10:00 p.m. and 12:00 a.m. that night, in dirty mechanic's clothes. Defendant bought "[a] dime of crack" for twenty dollars. After defendant left Holtzclaw's home, defendant made several calls from the area of his home in China Grove again. After cleaning up, defendant then returned to Holtzclaw's home around 2:00 a.m. and got forty or fifty dollars of drugs, paying out of a "handful of bills."

¶ 39 Thus, contrary to defendant's statement, the evidence shows that defendant did not stay at home on the night of 9 May 2016 but rather was in the vicinity of Mr. Davis's home and made multiple trips to buy drugs.

Moreover, when investigators manually searched defendant's phone, most of the call log and text message history had been deleted. In the light most favorable to the State, defendant's actions demonstrate that he lied to Detective Harper and attempted to conceal the events of the night, both of which are substantial evidence of defendant's guilty conscience.

¶ 40 In addition, when April called Terry's Auto Sales in the early morning of 10 May 2016 to ask about her father, defendant told her that Mr. Davis "isn't F-ing here anymore," indicating that defendant knew Mr. Davis was not returning. This statement occurred before anyone had discovered Mr. Davis's body. Later that day, when Detective Harper spoke with defendant and Carol at their home, defendant knew Mr. Davis was dead but had not told Carol, which Detective Harper thought was odd. Finally, there were no signs of forced entry at Mr. Davis's trailer, suggesting that Mr. Davis allowed the assailant to enter because he knew the person. Accordingly, substantial evidence supports the reasonable inference that defendant went to Mr. Davis's trailer during the night of 9 May 2016.

¶ 41 Taken together, these facts show that defendant had the motive, opportunity, and means to commit both the robbery with a dangerous weapon and the first-degree murder. Substantial evidence supports the reasonable inference that defendant was the person who went to Mr. Davis's trailer, murdered him, and took $3,000. Accordingly, the trial court did not err by denying defendant's motion to dismiss. The Court of Appeals, therefore, erred by reversing the trial court's denial of defendant's motion to dismiss. Because the Court of Appeals majority did not determine whether the trial court properly denied defendant's motion for a mistrial, we remand this case to the Court of Appeals to address this issue in the first instance. *See Blue v. Bhiro*, 2022-NCSC-45, ¶ 14 (reversing a decision of the Court of Appeals and remanding the case for the Court of Appeals to consider the plaintiff's remaining arguments).

REVERSED AND REMANDED.

Justice HUDSON dissenting.

¶ 42 In my view, the majority has misapplied our standard of review when testing the sufficiency of the evidence to support a conviction based on inference from circumstantial evidence. It is well-established that

> [o]nce the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the

> facts satisfy the jury beyond a reasonable doubt that the defendant is actually guilty. But if the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed.

State v. Chekanow, 370 N.C. 488, 492 (2018) (cleaned up). Here, the evidence presented is entirely circumstantial and substantial evidence of defendant's guilt must be based on reasonable inferences drawn therefrom. Because it appears to me that the majority has conflated "suspicion or conjecture"—even a series of suspicions and conjectures—as to the identity of the perpetrator of the murder and robbery of Mr. Davis with reasonable inferences drawn from the evidence, I must respectfully dissent.

¶ 43 On 10 May 2016, the Kannapolis Police Department was informed that someone had brutally murdered Arthur "Buddy" Davis, age seventy-nine, in his home. Terry, who was Mr. Davis's employer, and Mr. Davis's son-in-law had broken into Mr. Davis's trailer that morning to check in on him, and they uncovered a gruesome scene: the floor and walls were covered in blood, furniture was strewn about, and Mr. Davis's body lay mutilated by fourteen distinct stab wounds. Police responded robustly—the entire criminal investigations division as well as detectives from other units and senior officers began actively working the case as fast as possible. But without any eyewitnesses, forensic evidence, or video surveillance, the police decided that their suspect was most likely a "drug user[ ] who knew [Mr. Davis] had money." They began canvasing the area and questioning known drug users.

¶ 44 Defendant Dover, an impoverished drug addict who had worked with Mr. Davis, fit this description. Police questioned defendant but did not discover any cuts or marks that would be consistent with a struggle. Defendant claimed that he got home between 8:00 p.m. and 9:00 p.m. that night and stayed home the rest of the night, when the murder took place. Nevertheless, officers arrested defendant on unrelated charges of driving while license revoked and then monitored his jail phone line. When defendant called his girlfriend and asked her to post his bail using money that he had kept hidden, the police moved to intercept the money. In the State's own words, "[t]he problem [is that] in their financial straits and with two crack habits to support, they don't have any money." When cellphone location records indicated that defendant had not stayed home all night, as he had previously told police, he was additionally charged with robbery and murder.

¶ 45 The State argues that defendant must be the perpetrator based upon inferences drawn from the evidence. The evidence that is favorable to the State was summarized by the Court of Appeals as follows:

> Defendant lied to the police and changed his story as to his whereabouts on the night of the murder; cell tower records placed [d]efendant in the same vicinity as Mr. Davis's mobile home on the night of the murder; [d]efendant deleted his cellphone call and text messaging history; there was no forced entry in Mr. Davis's home, suggesting he knew the perpetrator; the fact that [d]efendant was in possession of $3,000.00 in cash with no explanation of where it came from; Mr. Davis's wallet and any cash he may have had were missing from his mobile home; [Terry]'s testimony that Mr. Davis usually "carried a lot of cash on him" and kept cash in his wallet; Mr. Davis planned to meet his daughter the morning after the murder to bring her money; [d]efendant's continued asking to borrow money from Mr. Davis; and Mr. Davis told [d]efendant a few days before his death he refused to loan [d]efendant any more money.

State v. Dover, 278 N.C. App. 723, 2021-NCCOA-405, ¶ 24 (footnote omitted). This evidence, taken in the light most favorable to the State, shows that defendant had a possible motive to commit the offenses of murder and armed robbery, but it at most raises only a suspicion or conjecture that defendant was the perpetrator of the robbery and murder. Contrary to the majority's position, I conclude that this evidence does not permit a reasonable inference that defendant took the $3,000 found in the trashcan from Mr. Davis, that defendant was at the scene of the crime in Mr. Davis's trailer, or that defendant was the person who robbed and murdered Mr. Davis.

¶ 46 First, the majority concludes that the evidence supports the inference that defendant had stolen the $3,000 recovered from the trashcan from Mr. Davis. Certainly that inference, if reasonably drawn, would support the further inference that defendant was the perpetrator of both the robbery and murder. However, the majority's inference that the money was taken from Mr. Davis is not supported by the evidence. The majority attempts to draw this inference based on the following facts: defendant had previously borrowed money from Mr. Davis and had called Mr. Davis asking to borrow money from him that night; defendant asked for help paying his power bill from Rowan Helping Ministries; defendant knew

the exact location of the $3,000 he had hidden; Mr. Davis frequently carried cash in his wallet and lent cash to family and friends; and, when Mr. Davis went to car shows with Terry, he carried large amounts of cash. The majority infers too much from this evidence, in my opinion, because nothing connects the $3,000 to Mr. Davis beyond mere conjecture.

¶ 47 Crucially, none of this evidence connects the $3,000 denominated in $100 bills found inside a glove inside a McDonald's bag in a trashcan across from defendant's residence to Mr. Davis or Mr. Davis's trailer. DNA testing on the glove containing the bills was inconclusive. None of the witnesses called by the State, including Mr. Davis's eldest daughter, his other daughter and son-in-law who lived in the trailer next door, his girlfriend, and his longtime friend and employer, testified that he kept large amounts of cash in his trailer. Accordingly, while Mr. Davis's wallet was stolen, the absence of other cash stored in his trailer does not indicate it is missing when no witness testified that it had been there previously. Even in the light most favorable to the State, the evidence shows only that while Mr. Davis was known to carry cash and give or lend it to friends and relatives, including his daughter and defendant, this usually was $20 at a time. Ms. Boshuizen, Mr. Davis's girlfriend, testified that when they went out Mr. Davis usually paid in cash, but when asked whether "[i]n [her] experience, . . . he sometimes carr[ied] large amounts of cash," she replied, "[n]ot large amounts, no." Indeed, the only testimony about Mr. Davis carrying large amounts of cash came from Terry, who testified that in the past he and Mr. Davis would go to car sales together and when they did, Mr. Davis would loan Terry money to buy cars and Terry would pay him back with interest. Terry testified they "used to go to" car auctions "when [Mr. Davis] had his own car lot," but no testimony indicated Mr. Davis was planning to go to a car sale around 9 May 2016. Moreover, while April testified that she was expecting to receive money from Mr. Davis the morning following his death, she did not testify to the amount of money she was expecting or whether it was denominated in $100 bills or smaller denominations. Accordingly, there is simply nothing from which to infer that $3,000 in cash was intended for April. Finally, the majority attempts to infer that the money belonged to Mr. Davis because it was "rolled up real tight and round," and according to Charlotte, Mr. Davis would occasionally carry money that way; however, no evidence showed that this common way of organizing a large quantity of bills was unique to Mr. Davis. Taken together, this evidence shows at most that Mr. Davis would give or loan out $20 or $30 at a time, that he did not usually carry large amounts of cash and tended to do so only in the past when he owned a car lot and went to car sales with Terry, that there was no evidence that he was planning to attend such a

sale around the time of his death, and that there was no evidence he kept large amounts of money in $100 denominations on his person or in his trailer at any time. The majority's attempted inferences to the contrary are sheer conjecture.

¶ 48 In contrast, the evidence shows that defendant regularly received cash from Terry, who testified that "[h]e was paid in cash" and "under the table," and directly from his customers, such as Murphy Sauls, who testified he paid $700 directly to defendant, including $400 borrowed from a friend and $300 drawn from an ATM. During his interrogation, defendant said he collected fees from customers, withheld a portion, and gave the rest to Terry. While we must make every reasonable inference in favor of the State, the only reasonable inference from the evidence here shows that it was defendant, and not Mr. Davis, who dealt regularly in $100 increments and large amounts of cash.

¶ 49 The majority further concludes that the money belonged to Mr. Davis and not defendant because of defendant's habit of getting loans in small dollar amounts from Mr. Davis and others and because defendant relied upon financial assistance from a charity to pay his power bill. But even in the light most favorable to the State, those facts show only defendant's poverty, which does not support an inference that the money belonged to Mr. Davis. As the first of several reasons, it is at least plausible that defendant, as someone who was paid under the table and engaged in drug deals, saved the money over time, keeping his savings in cash. Second, while a juror may reasonably infer that such a large quantity of cash in these circumstances may have been illegally obtained, that inference does not connect the money in any way to Mr. Davis. Third, the State's argument that defendant's possession of the $3,000 was "sudden and unexplained" as evidence permitting an inference of guilt effectively flips the burden of proof, when it is the State's duty to establish a connection between Mr. Davis and the $3,000 in defendant's possession.[1] Finally, defendant's knowledge of the location of the cash to provide his bail does not connect the $3,000 to Mr. Davis and cannot support the inference that defendant stole the money from Mr. Davis.

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1. The State conceded as much at trial when the State made the following argument on defendant's motion to dismiss inviting the trial court to flip the burden of proof:

> And, frankly, I've thought about it from Your Honor's perspective of *flipping it*. Well, if we look at it on the other hand, how else would the defendant come by these funds? The lack of any reasonable explanation as to where those funds came from, other than the one person that there's been testimony [from] that was in the defendant's life that others indicated had regular access to that much money.

¶ 50 The majority next concludes that defendant was at the scene of the crime based on defendant's contradictory statements to officers and cell tower information putting defendant's cellphone in the general vicinity of Mr. Davis's trailer that night. First, the State emphasizes that defendant initially lied to the police about his location on the night of 9 May 2016. While defendant claimed to be at home all night, he actually visited a drug dealer several times that evening. From this initial false statement, the State argues that it is reasonable to infer that defendant is guilty of murder and robbery. To be sure, the lie does not exculpate defendant. But without more evidence of defendant's actual location, to infer that it is "substantial evidence" he murdered the victim requires taking a flying and speculative leap past the more obvious, reasonable conclusion: he did not initially want to tell police he was using illegal drugs that night. According to State's witness Detective Harper, defendant did eventually explain to police that he visited a drug dealer that night. Cellphone records corroborate this description of events.

¶ 51 Indeed, the State's own expert stated that none of the cellphone location data collected proved defendant was at the victim's home. Because the State could not collect GPS data from defendant's phone using Cellebrite, they relied on cell tower information instead. Unlike GPS, which more precisely indicates where a *device* was located, cell tower information simply reveals which *tower* a cellphone connected to when a call was placed. A cell tower serves thousands of customers at a time and provides service to a wide area. In this case, when defendant used his cellphone to make calls on the night of 9 May 2016, his phone connected to a tower that served the drug dealer's house, Terry's Auto Sales, and Mr. Davis's trailer. In other words, the State's evidence proves only what defendant admits and a witness confirms: defendant was at the drug dealer's house getting high. Indeed, the State itself concedes defendant visited the drug dealer's house that night. In contrast, there is nothing about the cell tower information that permits the inference that defendant went to both the drug dealer's house and the trailer.

¶ 52 Because inferences from the evidence that the $3,000 was taken from Mr. Davis by defendant and that defendant was at Mr. Davis's trailer amount to nothing but conjecture, the circumstantial evidence presented here cannot be substantial evidence of defendant's guilt. Accordingly, as a final matter, I note that none of the forensic evidence connects defendant to the crime. Despite collecting swabs from the bloody crime scene at Mr. Davis's trailer, including from several objects, stains, and clothing, and from defendant's car and home, the State was unable to draw any connection between defendant and the murder by way of this

evidence. Where, as here, the State offers only conjecture and speculation in place of reasonable inferences from the circumstantial evidence, the simultaneous absence of direct evidence means that the case fails to satisfy the legal requirements for sufficiency of the evidence.

¶ 53 Ultimately, the conclusions the majority seeks to draw from the evidence, even in the light most favorable to the State, do not amount to substantial evidence that the $3,000 was taken from Mr. Davis, that defendant was at the scene of the crime, or that defendant was the perpetrator of the robbery and murder of Mr. Davis. While the majority is correct that "inferences on inferences" can support a conclusion that defendant committed the offenses charged under our caselaw, *State v. Childress*, 321 N.C. 226, 232 (1987), suspicion on suspicion and conjecture on conjecture cannot. *See Chekanow*, 370 N.C. at 492. Finally, arguments predicated on suspicion that invite the trier of fact to seek an explanation from the defendant cannot stand in for evidence and reasonable inferences that satisfy the burden of proof because " '[t]he presumption of innocence attends the accused throughout the trial and has relation to every essential fact that must be established in order to prove his guilt beyond a reasonable doubt.' He is not required to show his innocence; the State must prove his guilt." *State v. Wilkerson*, 164 N.C. 431, 438 (1913) (quoting *Kirby v. United States*, 174 U.S. 47 (1899)). Accordingly, I respectfully dissent.

Justice EARLS joins in this dissenting opinion.

STATE v. KELLIHER

[381 N.C. 558, 2022-NCSC-77]

STATE OF NORTH CAROLINA
v.
JAMES RYAN KELLIHER

No. 442PA20

Filed 17 June 2022

Sentencing—juvenile—two first-degree murders—defendant "neither incorrigible nor irredeemable"—de facto life without parole sentence

Defendant's two consecutive sentences of life (twenty-five years each) with the possibility of parole for a double homicide he committed at the age of seventeen—issued upon resentencing in light of *Miller v. Alabama*, 567 U.S. 460 (2012)—violated both the Eighth Amendment of the federal constitution and article I, section 27 of the state constitution where the trial court found in the resentencing hearing that defendant was "neither incorrigible nor irredeemable" and where the consecutive sentences, which together required defendant to serve fifty years in prison before becoming eligible for parole, constituted a de facto sentence of life without parole.

Chief Justice NEWBY dissenting.

Justices BERGER and BARRINGER join in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 273 N.C. App. 616 (2020), reversing a judgment entered 13 December 2018 by Judge Carl R. Fox in Superior Court, Cumberland County. On 10 March 2021, the Supreme Court allowed defendant's conditional petition for discretionary review as to additional issues. Heard in the Supreme Court on 10 November 2021.

Joshua H. Stein, Attorney General, by Kimberly N. Callahan, Special Deputy Attorney General, for the State-appellant.

Glenn Gerding, Appellate Defender, by Kathryn L. VandenBerg, Assistant Appellate Defender, for defendant-appellee.

Lisa Grafstein, Susan H. Pollitt, and Luke Woollard for Disability Rights North Carolina, amicus curiae.

Christopher J. Heaney, Emily A. Gibson, and Margaret P. Teich for North Carolina Advocates for Justice, amicus curiae.

EARLS, Justice.

¶ 1 When a child commits a murder, the crime is a searing tragedy and profound societal failure. Even a child has agency, of course; we do not absolve a child of all culpability for his or her criminal conduct. But there are different considerations at issue when sentencing a juvenile offender as compared to an adult criminal defendant. "[C]hildren are different" than adults in ways that matter for these purposes. *State v. James*, 371 N.C. 77, 96 (2018) (quoting *Miller v. Alabama*, 567 U.S. 460, 480 (2012)). A child's actions necessarily reflect that child's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences." *Miller*, 567 U.S. at 477. A child's actions also reflect the "environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional." *Id.* What a child's actions do not reflect, in the vast majority of cases, is that child's permanent and fundamental depravity, or what the United States Supreme Court has described as "irreparable corruption." *Roper v. Simmons*, 543 U.S. 551, 573 (2005). Given these unique attributes that define childhood, both the North Carolina and United States Constitutions impose limits on the use of our most severe punishments for juvenile offenders, even for those children who have committed the most egregious crimes imaginable.

¶ 2 On 7 August 2001, James Ryan Kelliher participated in the killing of Eric Carpenter and his pregnant girlfriend, Kelsea Helton. Kelliher was seventeen years old. At the time he was indicted, juveniles were still subject to the death penalty, and the State indicated its intent to try Kelliher capitally. Kelliher pleaded guilty to various charges including two counts of first-degree murder, for which he was ordered to serve two consecutive sentences of life without parole. After the United States Supreme Court issued its decision in *Miller v. Alabama*, 567 U.S. 460 (2012), the trial court conducted a resentencing hearing, during which the court expressly found that Kelliher was "a low risk to society" who was "neither incorrigible nor irredeemable." Nevertheless, the trial court ordered Kelliher to serve two consecutive sentences of life with the possibility of parole. Each of these sentences requires Kelliher to serve twenty-five years in prison before becoming eligible for parole. As a result, because the court ordered Kelliher to complete his first life sentence before beginning his second life sentence, Kelliher must serve fifty years in prison before initially becoming parole eligible at the age of sixty-seven.

¶ 3 On appeal, Kelliher argued that because the trial court found him to be "neither incorrigible nor irredeemable," it violated the Eighth Amendment to the United States Constitution and article I, section 27 of the North Carolina Constitution to sentence him to what he contended was a de facto sentence of life without parole. A unanimous panel of the Court of Appeals agreed that Kelliher's sentence violated the Eighth Amendment. *State v. Kelliher*, 273 N.C. App. 616, 644 (2020). After the Court of Appeals issued its decision, but prior to briefing and oral argument at this Court, the United States Supreme Court decided *Jones v. Mississippi*, another case examining the scope of the Eighth Amendment in the context of juvenile sentencing. 141 S. Ct. 1307 (2021). In addition to arguing that the Court of Appeals erred in concluding that Kelliher's consecutive life with parole sentences implicated the Eighth Amendment, the State now asserts that *Jones* completely undermines Kelliher's federal and state constitutional claims.

¶ 4 After careful review, we hold that it violates both the Eighth Amendment to the United States Constitution and article I, section 27 of the North Carolina Constitution to sentence a juvenile homicide offender who has been determined to be "neither incorrigible nor irredeemable" to life without parole. Furthermore, we conclude that any sentence or combination of sentences which, considered together, requires a juvenile offender to serve more than forty years in prison before becoming eligible for parole is a de facto sentence of life without parole within the meaning of article I, section 27 of the North Carolina Constitution because it deprives the juvenile of a genuine opportunity to demonstrate he or she has been rehabilitated and to establish a meaningful life outside of prison. Thus, Kelliher's sentence, which requires him to serve fifty years in prison before becoming eligible for parole, is a de facto sentence of life without parole under article I, section 27. Because the trial court affirmatively found that Kelliher was "neither incorrigible nor irredeemable," he could not constitutionally receive this sentence. Accordingly, we modify the decision of the Court of Appeals and affirm.

I. Background

¶ 5 Like many juveniles who commit criminal offenses, Kelliher experienced a tumultuous childhood. He was physically abused by his father and began using alcohol and marijuana regularly at an early age. He attempted suicide by overdose at age 10. He dropped out of school after ninth grade. By the time he was seventeen, Kelliher was generally "under the influence all day" from substances including ecstasy, acid, psilocybin, cocaine, marijuana, and alcohol. He stole and robbed people to support his drug use.

¶ 6 At some point, Kelliher began to "hang out with a guy named . . . [Joshua] Ballard." The two would regularly "drink and do drugs" together. Over the summer of 2001, the pair discussed robbing Eric Carpenter, who was "known to sell a large amount of drugs including cocaine and marijuana and would have a large amount of money." Ballard told Kelliher they were "going to have to kill Eric Carpenter" after robbing him because Carpenter would know their identities and be able to implicate them in the crime. Their plan was to arrange to purchase drugs from Carpenter behind a local furniture store. Kelliher would drive Ballard to the furniture store; Ballard would approach Carpenter to complete the transaction, shoot him, steal whatever drugs and money he had on his person and in his vehicle, and then flee alongside Kelliher. Kelliher offered to lend Ballard his .38 caliber pistol.

¶ 7 After arranging the drug buy, Ballard and Kelliher drove to the furniture store in a pickup truck.[1] However, at the furniture store, they encountered a law enforcement officer in a marked vehicle driving around the parking lot. Carpenter pulled his vehicle next to Kelliher's and told Kelliher to follow him to another location. Eventually, Carpenter led Ballard and Kelliher to his apartment, where they were joined by Carpenter's girlfriend, Kelsea Helton, who was "five[or] six months" pregnant. According to Kelliher's later testimony, at some point Ballard "pulled the weapon" and "got both [Carpenter and Helton] down . . . on their knees facing a wall." As Kelliher continued to "gather[ ]" drugs from around Carpenter's apartment, "he heard two shots, saw two flashes." Kelliher and Ballard fled the apartment and ran back to Kelliher's vehicle. They then spent time using cocaine and marijuana they stole from the apartment and drinking liquor in a park. Carpenter and Helton died of gunshot wounds to the backs of their heads.

A. Initial trial and resentencing

¶ 8 Kelliher was arrested two days after the shootings. On 25 March 2002, he was indicted by a Cumberland County Grand Jury for two counts of first-degree murder, two counts of robbery with a dangerous weapon, and one count of conspiracy to commit robbery. On 5 June 2002, the Superior Court, Cumberland County conducted a Rule 24 hearing during which the State averred that it "ha[d] evidence of one or more aggravating factors which would call for the imposition of the death penalty." Before the case came to trial, Kelliher pleaded guilty to all charges; in exchange, the District Attorney "exercise[d] his discretion . . . [to]

1. A third person was also present in Kelliher's vehicle, although he did not have "any role" in the crime "other than just literally being a warm body in the back of the truck."

declare the murder cases to be non-capital."[2] The trial court imposed two consecutive sentences of life without parole for the first-degree murder convictions and term-of-years sentences for the robbery and conspiracy convictions, to be run concurrently. Kelliher did not appeal.[3]

¶ 9 In 2013, Kelliher filed a motion for appropriate relief (MAR) alleging that his sentence was unconstitutional under the Eighth Amendment as interpreted by the United States Supreme Court in *Miller v. Alabama*, 567 U.S. 460 (2012). The trial court denied Kelliher's MAR on the grounds that *Miller* did not apply retroactively. However, this Court later held—consistent with the United States Supreme Court's decision in *Montgomery v. Louisiana*, 577 U.S. 190, 205 (2016)—that *Miller* announced a substantive constitutional rule that was retroactively applicable in state post-conviction proceedings. *See State v. Young*, 369 N.C. 118, 120 (2016). Accordingly, the Court of Appeals issued an order reversing the trial court's denial of Kelliher's MAR and remanding for resentencing.

¶ 10 On 13 December 2018, Kelliher's resentencing hearing was held in Cumberland County Superior Court. At the hearing, the State sought life without parole or, in the alternative, two consecutive sentences of life with parole. In support of its position, the State presented a summary of the factual basis for Kelliher's convictions and victim impact testimony from Carpenter's and Helton's fathers. Carpenter's father described learning of his son's death after his neighbors brought him to the crime scene. He conveyed his anger at never getting the chance to meet his grandson. Helton's father described cleaning up the apartment after the murders because he "didn't want somebody else cleaning the blood of [his] daughter off the wall." He discussed how painful it was to see the sad expression on his daughter's face when she died. Both parents shared the ongoing pain and trauma they experienced after losing a child; Helton's father noted that while Kelliher could still find ways to enjoy his life, Kelliher's actions denied Helton, Carpenter, and their unborn child that opportunity.

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2. One year after Kelliher entered his guilty plea, the United States Supreme Court held the death penalty unconstitutional for juvenile offenders in *Roper v. Simmons*, 543 U.S. 551 (2005).

3. Ballard was also arrested and faced the same charges as Kelliher. He pleaded not guilty and was tried capitally. At trial, Kelliher testified for the State, and Ballard was convicted of all charges and received two consecutive sentences of life without parole. However, his convictions were overturned on appeal because the trial court failed to properly question and advise Ballard before he waived his right to a conflict-free trial counsel. *State v. Ballard*, 180 N.C. App. 637, 643 (2006). On remand, Ballard was acquitted.

¶ 11 Kelliher requested that he be sentenced to concurrent sentences of life with parole. In support of his position, Kelliher presented testimony from a forensic psychologist who described Kelliher's difficult childhood and history of substance abuse; the director of a prison-based theological seminary who testified that Kelliher had been selected to train as a "field minister[ ];" a prison writing instructor who described Kelliher's exemplary work as a writing tutor to other inmates; and Kelliher's pastor, who expressed his view that Kelliher was "absolutely" redeemable. Kelliher also submitted records indicating that he had obtained his GED, associate degree, and a paralegal certificate while in prison; had completed Bible correspondence courses, courses in anger management, coping, and alcohol and drug dependence; and was serving as an inmate treatment assistant.

¶ 12 At the conclusion of the hearing, the sentencing court found the following facts with respect to Kelliher's mitigation evidence:

> One, the defendant was under the age of 18 at the time of the offenses.
>
> Two, due to the defendant's young age, the abusive environment in which he was raised, and his ninth grade education he was immature at the time of the offenses.
>
> Three, the defendant had no prior record at the time of the offenses.
>
> Four, the defendant suffered from ADHD at the time of the offenses.
>
> Five, there is substantial evidence that the defendant has benefitted from rehabilitation while in confinement in that the defendant appears to have been a model inmate with the exception of two infractions for possession [of] non-threatening contraband and being in an unauthorized area.
>
> With respect to other mitigating factors and circumstances the Court also finds present are six, at the time of the offenses the defendant was addicted to drugs.
>
> Seven, the defendant voluntarily accepted responsibility for his criminal conduct, acknowledged wrongdoing in connection with the offenses, and pled guilty as charged.

> Eight, the defendant testified truthfully for the State against his co-defendant twice without a plea agreement or promise of sentence consideration.
>
> Nine, the defendant has furthered his education while incarcerated in that he has attempted to improve himself by taking advantage of programs offered by the North Carolina Division of Adult Corrections by applying for acceptance to a program offered by Southeastern Baptist Seminary at Nash Correctional Center being selected as one of 30 inmates to enter the program out of 362 applicants and successfully completing his first year of the program leading to a bachelor[']s degree in pastoral ministry with a minor in counseling.
>
> Ten, the defendant has continued to pursue a course of self-improvement by teaching himself Spanish.
>
> Eleven, during his incarceration the defendant has worked as a janitor, warehouse worker, maintenance, plumbing, welding, peer counselor, and teacher's aide.
>
> Twelve, a risk assessment by Dr. Thomas Harbin, Ph.D., suggests the defendant presents a low risk of future violent offenses and a risk assessment by the North Carolina Division of Adult Corrections found that the defendant has a low risk of danger to the public.
>
> Thirteen, the defendant has a support system in the community as evidenced by the presence of his parents, sister, and other family friends at this hearing.

Based on these findings of fact, the sentencing court concluded that "the mitigating factors and other factors and circumstances present outweigh all the circumstances of the offense" and that "the defendant is neither incorrigible nor irredeemable." However, the sentencing court also explained that, in its view, "when it comes to murder, there are not bogos. There is no buy one, get one. There is no kill one, get one. There is no[ ] combination of sentences. There is no consolidation of sentences." Therefore, the sentencing court ordered Kelliher to serve two consecutive sentences of life with parole for the two counts of murder he committed.

B. The Court of Appeals decision

¶ 13 On appeal, a unanimous Court of Appeals panel reversed and held that imposing two consecutive sentences of life with parole violated Kelliher's Eighth Amendment right to be free from cruel and unusual punishment. *Kelliher*, 273 N.C. App. at 644. The court's decision rested on three main conclusions. First, the Court of Appeals examined four relevant United States Supreme Court precedents—*Roper*, *Graham v. Florida*, 560 U.S. 48 (2010), *Miller*, and *Montgomery*—and concluded that these decisions established the following substantive constitutional rule:

> [J]uvenile homicide offenders who are neither incorrigible nor irreparably corrupt, are—like other juvenile offenders—so distinct in their immaturity, vulnerability, and malleability as to be outside the realm of [life without parole] sentences under the Eighth Amendment.

Kelliher, 273 N.C. App. at 632. Because the sentencing court had deemed Kelliher "neither incorrigible nor irredeemable," the Court of Appeals reasoned that he could not be sentenced to life without parole consistent with the requirements of the Eighth Amendment.

¶ 14 Second, the Court of Appeals concluded that "aggregated sentences may give rise to a *de facto* [life without parole] punishment." *Id.* at 638. According to the Court of Appeals, the substantive Eighth Amendment rule the United States Supreme Court articulated in its juvenile homicide cases "turned on the identity of the defendant, *not* on the crimes perpetrated." *Id.* at 639. Addressing cases from other jurisdictions which had refused to recognize aggregate punishments as de facto life without parole sentences, the Court of Appeals found those cases "distinguishable" based on its view that North Carolina's "caselaw and statutes compel the State to consider consecutive sentences as a single punishment." *Id.* at 640. Therefore, the Court of Appeals concluded that Kelliher's two consecutive life with parole sentences should be treated as a single sentence requiring Kelliher to serve fifty years before becoming eligible for parole.

¶ 15 Third, the Court of Appeals concluded that Kelliher's two consecutive life with parole sentences were equivalent to a de facto life without parole sentence and thus implicated the Eighth Amendment. Specifically, the Court of Appeals held that "a sentence that provides no opportunity for release for 50 or more years is cognizable as a de facto [life without parole] sentence." *Id.* at 644. In reaching this conclusion, the Court of Appeals looked to N.C.G.S. § 15A-1340.19, a statute amending North Carolina's juvenile sentencing scheme in the wake of *Miller*,

which provides that "[i]f the sole basis for conviction of a count or each count of first degree murder was the felony murder rule, then the court shall sentence the defendant to life imprisonment with parole." N.C.G.S. § 15A-1340.19B(a)(1) (2021). Although the Court of Appeals acknowledged that Kelliher "has clearly abandoned any assertion that he was convicted under the felony murder rule. But N.C.[G.S.] § 15A-1340.19B(a)(1) nonetheless indicates that our General Assembly has determined parole eligibility at 25 years for multiple offenses sanctionable by life with parole is not so excessive as to run afoul of *Miller*." *Kelliher*, 273 N.C. App. at 643 (citations omitted). In addition, the Court of Appeals noted that a fifty-year sentence would render Kelliher ineligible for release until after "retirement age," depriving him of an "opportunity to directly contribute to society," and that such a sentence "falls at the limit identified by numerous other jurisdictions as constituting an unconstitutional *de facto* [life without parole] sentence." *Id.* at 641–42.

¶ 16 In summary, the Court of Appeals held that

> under Eighth Amendment jurisprudence: (1) *de facto* [life without parole] sentences imposed on juveniles may run afoul of the Eighth Amendment; (2) such punishments may arise out of aggregated sentences; and (3) a sentence that provides no opportunity for release for 50 or more years is cognizable as a *de facto* [life without parole] sentence. Consistent with the Eighth Amendment as interpreted by *Roper*, *Graham*, *Miller*, and *Montgomery*, these holdings compel us to reverse and remand Defendant's sentence.

Id. at 644. The Court of Appeals did not separately address Kelliher's argument that his sentence violated article I, section 27 of the North Carolina Constitution. Rather, citing this Court's decision in *State v. Green*, 348 N.C. 588 (1998), the Court of Appeals stated that its "analysis . . . applies equally to both" Kelliher's federal and state constitutional claims. *Kelliher*, 273 N.C. App. at 633 n. 10.

¶ 17 The State filed a notice of appeal of a constitutional question pursuant to N.C.G.S. § 7A-30(1) and, in the alternative, a petition for discretionary review pursuant to N.C.G.S. § 7A-31. This Court allowed the State's petition for discretionary review and, in addition, Kelliher's conditional petition seeking review of the scope of protection afforded to him under article I, section 27 of the North Carolina Constitution.

II. Federal constitutional claim

¶ 18 The Eighth Amendment to the United States Constitution provides in full that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. XIII. "[T]he words of the Amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100–101 (1958).

¶ 19 Criminal punishment is cruel and unusual within the meaning of the Eighth Amendment when it is disproportionate. *See, e.g.*, *Montgomery*, 577 U.S. at 206 ("Protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment and goes far beyond the manner of determining a defendant's sentence."); *Graham*, 560 U.S. at 59 ("The concept of proportionality is central to the Eighth Amendment."). A punishment can be unconstitutionally disproportionate as applied to a particular offender for a particular offense if it is an "extreme sentence[ ] that [is] 'grossly disproportionate' to the crime." *Harmelin v. Michigan*, 501 U.S. 957, 1001 (Kennedy J., concurring in part) (quoting *Solem v. Helm*, 463 U.S. 277, 288 (1983)). In these cases, a court "considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive." *Graham*, 560 U.S. at 59. A punishment can also be disproportionate as applied to all offenders within a particular category based on "the nature of the offense" or "the characteristics of the offender." *Id.* at 60. In these cases, courts utilize a two-step inquiry:

> The Court first considers "objective indicia of society's standards, as expressed in legislative enactments and state practice," to determine whether there is a national consensus against the sentencing practice at issue. *Roper*, [543 U.S.] at 572, 125 S.Ct. 1184. Next, guided by "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose," *Kennedy*[*v. Louisiana*], 554 U.S. [407,] 421 [(2008)], 128 S.Ct., at 2650, the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution.

Id. at 61.

¶ 20 In this case, Kelliher argues that his consecutive life sentences are unconstitutional because he falls within a category of offenders for whom a sentence of life without parole is always and inevitably disproportionate: juvenile offenders who are "neither incorrigible nor irredeemable." This argument requires Kelliher to establish two necessary corollaries: (1) that the Eighth Amendment flatly prohibits the imposition of a sentence of life without parole for the category of juvenile homicide offenders who are "neither incorrigible nor irredeemable"; and (2) that he has received a sentence which the Eighth Amendment forbids for this category of offenders, e.g., a de facto sentence of life without parole. We conclude that the Eighth Amendment does bar the imposition of life without parole for the category of juvenile homicide offenders who have expressly been found to be "neither incorrigible nor irredeemable" and that consecutive sentences requiring a juvenile offender to serve fifty years before becoming parole eligible are de facto life without parole sentences. Thus, we conclude that Kelliher's consecutive life sentences requiring him to serve fifty years before he becomes eligible for parole violate the Eighth Amendment.[4]

A. Eighth Amendment principles

¶ 21 The United States Supreme Court has considered the meaning of the Eighth Amendment in the juvenile sentencing context on numerous occasions over the past two decades. In this case, the Court of Appeals comprehensively examined four relevant Supreme Court precedents: *Roper*, *Graham*, *Miller*, and *Montgomery*. Although the parties dispute the applicability of these precedents to Kelliher's particular sentence, as well as their significance in light of the United States Supreme Court's recent decision in *Jones*, the parties do not meaningfully contest the Court of Appeals' characterization of these cases. Accordingly, we will only briefly summarize these four cases to contextualize Kelliher's claims and our subsequent legal analysis.

1. Roper, Graham, Miller, Montgomery

¶ 22 In *Roper v. Simmons*, the United States Supreme Court held that it violated the Eighth Amendment to execute juvenile offenders, including those who committed homicide offenses. 543 U.S. at 575. This constitutional rule was rooted in the Supreme Court's assessment of "[t]he differences between juvenile and adult offenders" which bore on the

4. Our resolution of Kelliher's appeal in this case is consistent with this Court's resolution of the defendant's appeal from *State v. Conner*, 275 N.C. App. 758 (2020), also issued today.

various penological justifications for imposing criminal punishment. *Id.* at 572. The Supreme Court identified "[t]hree general differences between juveniles under 18 and adults [which] demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders" who could be subjected to the death penalty "no matter how heinous the crime." *Id.* at 568–69. These differences were (1) juveniles' "lack of maturity and . . . underdeveloped sense of responsibility," *id.* at 569 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)); (2) that juveniles were "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," *id.* (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)); and (3) the fact that "the character of a juvenile is not as well formed as that of an adult," meaning "[t]he personality traits of juveniles are more transitory, less fixed," *id.* at 570.

¶ 23 These differences rendered juvenile offenders categorically less morally culpable for their criminal conduct than adults who committed the same criminal acts. *Id.* By extension, the two penological justifications for imposing the death penalty—"retribution and deterrence of capital crimes by prospective offenders"—applied "with lesser force" to juveniles than to adults. *Id.* at 571 (first quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)). According to the Court, "[r]etribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Id.* "As for deterrence, it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles . . . . [And] the absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." *Id.* Thus, without looking away from "the brutal crimes too many juvenile offenders have committed," the Supreme Court concluded that "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability." *Id.* at 572–73.

¶ 24 In *Graham v. Florida*, the Supreme Court reaffirmed its "observations in *Roper* about the nature of juveniles" and the "fundamental differences between juvenile and adult minds" in holding that the Eighth Amendment forbid the imposition of life without parole for juvenile non-homicide offenders. 560 U.S. at 68. The Court explained that although a sentence of life without parole was less severe than the death penalty, the sentences "share some characteristics . . . that are shared by no other sentences," including that both "alter[ ] the offender's life by

a forfeiture that is irrevocable" and "deprive[ ] the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence." *Id.* at 69–70. The Court also noted that life without parole was "an especially harsh punishment for a juvenile" because "[u]nder this sentence a juvenile will on average serve more years and a greater percentage of his life in prison than an adult offender," a "reality [that] cannot be ignored." *Id.* at 70–71. As in *Roper*, the Court examined the "penological justification[s]" for imposing life without parole and concluded that "[w]ith respect to life without parole for juvenile nonhomicide offenders, none of the goals of penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation—provides an adequate justification" *Id.* at 71 (citations omitted). Accordingly, the Supreme Court held that while states are "not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime," states must give juvenile nonhomicide offenders "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75.

¶ 25 Next, in *Miller v. Alabama*, the Supreme Court held "that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " 567 U.S. at 465. In *Miller*, the Supreme Court drew on "two strands of precedent reflecting our concern with proportionate punishment." *Id.* at 470. The first set of precedents, which included *Roper* and *Graham*, "adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty." *Id.* These cases established that "children are constitutionally different from adults for purposes of sentencing." *Id.* at 471. The second set of precedents included cases "demanding individualized sentencing when imposing the death penalty." *Id.* at 475. These cases demonstrated that "in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult" and in the process fails to consider a juvenile offender's "age and the wealth of characteristics and circumstances attendant to it." *Id.* at 476–77. Read together, these two strands of precedent led the Supreme Court to conclude that "the Eighth Amendment forbids a sentencing scheme that mandates life without possibility of parole for juvenile offenders," including juveniles convicted of homicide offenses. *Id.* at 479.

¶ 26 Notably, the Supreme Court refused to "consider [the juvenile offenders'] alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger." *Id.* Nonetheless, the Court explained that

> given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to [life without parole] will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Roper*, 543 U.S. at 573, 125 S.Ct. 1183; *Graham*, 560 U.S., at 68, 130 S.Ct., at 2026-2027. Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.

Id. at 479–80.

¶ 27 Finally, in *Montgomery v. Louisiana*, the Supreme Court confirmed that *Miller* announced a substantive constitutional rule retroactively applicable in state post-conviction proceedings. 577 U.S. at 200. The Supreme Court explained that under *Teague v. Lane*, 489 U.S. 288 (1989), "courts must give retroactive effect to new watershed procedural rules and to substantive rules of constitutional law." *Montgomery*, 577 U.S. at 198. The latter category encompassed " 'rules forbidding criminal punishment of certain primary conduct,' as well as 'rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.' " *Id.* (quoting *Penry v. Lynaugh*, 392 U.S. 302, 330 (1989)). Substantive rules "set forth categorical constitutional guarantees that place certain criminal laws and punishment altogether beyond the State's power to impose." *Id.* at 201. The Supreme Court held that *Miller* announced the substantive rule that life without parole was forbidden as a "disproportionate sentence" under the Eighth Amendment for every juvenile homicide offender whose crime reflected "transient immaturity" as opposed to "irreparable corruption." *Id.* at 209.

¶ 28 In concluding that *Miller* announced a substantive constitutional rule, *Montgomery* clarified the scope and meaning of *Miller*'s holding. The Supreme Court stated that "[a]lthough *Miller* did not foreclose a sentencer's ability to impose life without parole on a juvenile, [*Miller*] explained that a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect irreparable

corruption." *Id.* at 195 (cleaned up); *see also id.* at 208 ("The [*Miller*] Court recognized that a sentencer might encounter the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified."). The Supreme Court further explained that the existence of a discretionary sentencing scheme did not itself guarantee that a juvenile homicide offender could constitutionally be sentenced to life without parole:

> *Miller*, then, did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole . . . . Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity. Because *Miller* determined that sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption, it rendered life without parole an unconstitutional penalty for a class of defendants because of their status–that is, juvenile offenders whose crimes reflect the transient immaturity of youth. As a result, *Miller* announced a substantive rule of constitutional law.

Id. (cleaned up). In reaching this conclusion, the Court expressly rejected the argument that "*Miller* is procedural because it did not place any punishment beyond the State's power to impose," holding instead that "*Miller* did bar life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Id.* at 209.

¶ 29 As summarized in *Montgomery*, the United States Supreme Court decisions addressing juvenile offenders up until this point "drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption." *Id.* A sentence of "life without parole could be a proportionate sentence for *the latter kind of juvenile offender*," but not the former. *Id.* (emphasis added). Sentencing courts would be required to conduct "[a] hearing where youth and its attendant characteristics are considered as sentencing factors" in order to "separate those juveniles who may be sentenced to life without parole" (e.g., those "whose crimes reflect irreparable corruption") "from those who may not" (e.g., those "whose crimes reflect transient immaturity" and for whom life without parole is "an excessive sentence"). *Id.* at 210 (cleaned up); *see also id.* at 211 ("That *Miller*

did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment."). Thus, as the Court of Appeals correctly held in this case, under the precedents before it at the time Kelliher's appeal was decided, the Eighth Amendment prohibited the imposition of a sentence of life without parole on a juvenile who, like Kelliher, was found to be "neither incorrigible nor irredeemable."

2. *The impact of* Jones v. Mississippi

¶ 30 Yet our federal constitutional analysis does not end with *Roper*, *Graham*, *Miller*, and *Montgomery*. After the Court of Appeals issued its opinion in this case, the United States Supreme Court decided *Jones v. Mississippi*, another decision examining the Eighth Amendment protections afforded to juvenile homicide offenders. The State argues that even if the Court of Appeals correctly interpreted the United States Supreme Court's earlier juvenile sentencing decisions, *Jones* fundamentally alters the Supreme Court's Eighth Amendment jurisprudence. In the State's view, *Jones* establishes that the Eighth Amendment requires nothing more than the existence of a discretionary sentencing procedure under which the sentencer is allowed to consider a juvenile homicide offender's youth; the State contends that, after *Jones*, any juvenile homicide offender can be sentenced to life without parole once these procedural prerequisites have been satisfied. In contrast, Kelliher reads *Jones* as a narrow ruling answering a procedural question arising after *Miller* and *Montgomery*: whether a sentencing court must enter a finding that the juvenile is irreparably corrupt before sentencing that juvenile to life without parole. In Kelliher's view, *Jones* solely addressed this question and in no way abrogated the substantive constitutional rule articulated in *Miller* and *Montgomery*.

¶ 31 In *Jones*, a Mississippi trial court sentenced fifteen-year-old Brett Jones to life without parole for first-degree murder. 141 S. Ct. at 1311. The court which sentenced Jones did not enter a finding declaring Jones "permanently incorrigible," nor did the sentencing court "provide an on-the-record sentencing explanation with an implicit finding that the defendant is permanently incorrigible." *Id.* Jones argued that this omission meant his sentence ran afoul of the substantive Eighth Amendment rule articulated in *Miller* and made retroactively applicable in *Montgomery*. *Id.* The United States Supreme Court disagreed.

¶ 32 According to the Supreme Court, *Miller* and *Montgomery* "squarely rejected" the argument that a sentencing court "must also make a

separate factual finding of permanent incorrigibility before sentencing a murderer under 18 to life without parole." *Id.* at 1314. Instead, the Supreme Court read *Miller* and *Montgomery* as establishing that "a separate factual finding of permanent incorrigibility is not required." *Id.* at 1313; *see also id.* at 1318–19 ("The Court has unequivocally stated that a separate factual finding of permanent incorrigibility is not required before a sentencer imposes a life-without-parole sentence on a murderer under 18."). Additionally, the Supreme Court explained that "an on-the-record sentencing explanation is not necessary to ensure that a sentencer considers a defendant's youth" because "if the sentencer has discretion to consider the defendant's youth, the sentencer necessarily will consider the defendant's youth, especially if defense counsel advances an argument based on the defendant's youth." *Id.* at 1319. Therefore, the fact that the sentencing court did not explicitly find Jones to be incorrigible before sentencing him to life without parole did not offend the Eighth Amendment, as the sentencing court possessed the discretion to impose a lesser sentence based on its own consideration of Jones' youth. *Id.*

¶ 33 On its face, aspects of *Jones* could be viewed as conflicting with, and thus implicitly overruling, aspects of *Miller* and *Montgomery*. For example, the Supreme Court in *Jones* stated that "[i]n a case involving an individual who was under 18 when he or she committed a homicide, a State's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient." *Id.* at 1313. As the State argues, this language could be read to suggest that the Eighth Amendment permits courts to sentence *any* juvenile homicide offender to life without parole, as long as the sentencing court does so in an exercise of its discretion having considered the defendant's youth. If the State were correct, we would agree that Kelliher's Eighth Amendment claim would necessarily fail: it is indisputable that his sentencing court possessed the discretion to sentence Kelliher to a lesser sentence, and the court plainly considered his youth.

¶ 34 This expansive reading of *Jones* is in significant tension with *Miller* and especially *Montgomery*. In the latter case, the Supreme Court explicitly rejected the argument the State contends the Supreme Court adopted in *Jones*, the argument that the Eighth Amendment requires nothing more than that "sentencing courts . . . take children's age into account before condemning them to die in prison." *Montgomery*, 577 at 209. Instead, the *Montgomery* Court concluded that *Miller* "did bar life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Id.*; *see also id.* at 208

("Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity." (cleaned up)). Thus, adopting the State's position would require us to read *Jones* as repudiating core Eighth Amendment principles articulated in *Miller* and *Montgomery*.

¶ 35 The problem with the State's proposed interpretation of *Jones* is that it is irreconcilable with the Supreme Court's own characterization of the question it was answering in *Jones*, the narrowness of its holding, and its description of the relationship between *Jones* and the Supreme Court's prior juvenile sentencing decisions. By its plain terms, *Jones* makes clear that the Supreme Court intended only to reject an effort to append a new procedural requirement to *Miller*'s and *Montgomery*'s substantive constitutional rule; the Court did not intend to retreat from the substantive constitutional rule articulated in those cases.

¶ 36 For example, the *Jones* Court expressly and repeatedly affirmed that its decision was fully consistent with, and in no way abrogated or overturned, *Miller* and *Montgomery*. *See*, *e.g.*, *Jones*, 141 S. Ct. at 1321 ("The Court's decision today carefully follows both *Miller* and *Montgomery*. . . . Today's decision does not overrule *Miller* or *Montgomery*."); *see also id.* at 1337 (Sotomayor, J., dissenting) ("[S]entencers should hold this Court to its word: *Miller* and *Montgomery* are still good law."). The *Jones* Court characterized its holding as addressing the narrow question of whether to recognize "an *additional* constitutional requirement that the sentencer must make a finding of permanent incorrigibility before sentencing a murderer under 18 to life without parole," a requirement not imposed by the "significant changes wrought by *Miller* and *Montgomery*." *Id.* at 1322 (emphasis added); *see also id.* at 1323 (Thomas, J., concurring in the judgment) ("The Court correctly holds that the Eighth Amendment does not require a finding that a minor be permanently incorrigible as a prerequisite to a sentence of life without parole."). The *Jones* Court explained that its answer to this question was compelled by "what *Miller* and *Montgomery* said—that is, their explicit language addressing the precise question before us and definitively rejecting any requirement of *a finding* of permanent incorrigibility." *Id.* (emphasis added). These statements do not support the State's argument that *Jones* countermanded previously decided substantive Eighth Amendment doctrine.

¶ 37 Rather, the "explicit language addressing the precise question before" the Supreme Court in *Jones* demonstrates that the Supreme Court's procedural holding in that case did not displace "*Miller's substantive*

holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." *Montgomery*, 577 U.S. at 210 (emphasis added). Accordingly, we reject the State's argument that *Jones* controls when a juvenile homicide offender who the sentencing court has found to be redeemable is, nevertheless, sentenced to life without parole. Certainly, *Jones* establishes that the Eighth Amendment does not require a sentencing court to find a juvenile homicide offender permanently incorrigible before sentencing that juvenile to life without parole under a discretionary sentencing scheme like North Carolina's. But *Jones* does not alter the substantive Eighth Amendment rule announced in *Miller* and *Montgomery* which forbids a sentencing court from sentencing redeemable juveniles to life without parole. To hold otherwise would require us to read *Jones* far more expansively than the Supreme Court intended, the very sin that *Jones* warns against committing. Instead, *Jones* reflects the Supreme Court's confidence that sentencing courts with the discretion to adjust juvenile offenders' sentences based on consideration of their youth will exercise that discretion to distinguish between those juveniles who constitutionally can be sentenced to life without parole and those who cannot.

¶ 38 Therefore, consistent with *Miller*, *Montgomery*, and *Jones*, we conclude that the Eighth Amendment categorically prohibits a sentencing court from sentencing any juvenile to life without parole if the sentencing court has found the juvenile to be "neither incorrigible nor irredeemable." Based on the sentencing court's findings in this case, specifically the court's express finding that Kelliher is "neither incorrigible nor irredeemable," Kelliher cannot be sentenced to life without parole consistent with the Eighth Amendment. Having reached this conclusion, we next address whether his aggregate sentences requiring him to spend fifty years in prison before becoming eligible for parole constitute a de facto life without parole sentence within the meaning of the Eighth Amendment.

B. De facto life without parole is cognizable under the Eighth Amendment

¶ 39 The Court of Appeals held that Kelliher's sentences comprised a "*de facto* [life without parole] sentence[ ]" which was "cognizable as a cruel and unusual punishment barred under" the Eighth Amendment. *Kelliher*, 273 N.C. App. at 633. As recounted above, the Court of Appeals reasoned that in assessing the scope of protection afforded by the Eighth Amendment, it would consider "the true reality of the actual punishment imposed on a juvenile" rather than how the punishment was formally denoted. *Id.* at 636. Accordingly, the Court of Appeals held that a

sentence constitutes de facto life without parole if it deprives a juvenile offender "of the 'hope for some years of life outside prison walls' required by *Graham* and *Miller*." *Id.* at 641 (quoting *Montgomery*, 577 U.S. at 213). This proposition held true even if the sentence resulted from convictions for multiple offenses (or multiple counts of the same offense), because "[t]he applicability and scope of protection found in the Eighth Amendment under both decisions turned on the identity of the defendant, *not* on the crimes perpetrated." *Id.* at 639. In recognizing the de facto life without parole doctrine, the Court of Appeals joined what it characterized as the "clear majority" of states to have considered this question. *Id.* at 634–35.

¶ 40 Kelliher urges us to affirm and hold that "the Eighth Amendment applies to juvenile offenders with lengthy sentences, including sentences allowing a possibility of release before death." In his view, the Eighth Amendment requires granting all juvenile offenders except those who have been deemed incorrigible "a meaningful opportunity for release before most of their life has passed by," an opportunity his two consecutive life with parole sentence denies him. By contrast, the State argues that "[a]bsent further guidance from the Supreme Court of the United States," this Court should not recognize sentences other than those formally denoted life without parole as implicating the Eighth Amendment. Regardless, the State contends that even if we were to recognize the de facto life without parole doctrine, Kelliher's sentence is not akin to de facto life without parole because "[a] sentence that affords a defendant an opportunity for parole even at an older age cannot be said to be its functional equivalent."

¶ 41 The question of whether to recognize lengthy and aggregate sentences as de facto life without parole has not been resolved by the United States Supreme Court and has divided state and federal courts. Nevertheless, our reading of the principles enunciated in the Supreme Court's juvenile sentencing cases persuades us that Kelliher's sentence triggers the substantive constitutional rule set forth in *Miller* and *Montgomery*. We agree with Kelliher and the Court of Appeals that the Eighth Amendment requires courts to afford redeemable juvenile offenders "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75.

¶ 42 The crux of *Roper*, *Graham*, *Miller*, and *Montgomery* was the uniqueness of adolescence and the ways youth's distinctive characteristics related to the penological justifications for imposing criminal punishment. The salient circumstances rendering certain punishments constitutionally impermissible in *Miller* and *Montgomery* related to the nature of

the offender, not the circumstances of the crime. Put another way, the "underlying rationale" of these cases was "not crime specific." *State v. Null*, 836 N.W. 2d 41, 73 (Iowa 2013). Further, the Supreme Court has not drawn the distinction the State now presses between sentences arising from a single offense and those arising from multiple offenses, despite having been presented with multiple opportunities to do so. For example, one of the juvenile offenders in *Miller* was convicted of felony murder and aggravated robbery, while the other was convicted of murder in the course of arson; the Supreme Court did not indicate that the substantive constitutional rule it was announcing varied in its applicability as between the two juveniles. *See Miller*, 567 U.S. at 467–69. And, as the Supreme Court of Iowa has noted, "after *Miller*, the Supreme Court in several cases involving aggregate crimes granted certiorari, vacated the sentence, and remanded for consideration in light of *Miller*." *Null*, 836 N.W.2d at 73–74 (collecting cases).

¶ 43 As the Supreme Court has stated, when it comes to the Eighth Amendment, "reality cannot be ignored." *Graham*, 560 U.S. at 71. Therefore, we agree with Kelliher and the Court of Appeals that a sentence of fifty years before parole eligibility is akin to a de facto sentence of life without parole within the meaning of the Eighth Amendment. Allowing a juvenile the opportunity to be released on parole only after spending fifty years in prison "den[ies] the defendant the right to reenter the community" in any meaningful way. *Id.* at 74; *see also People v. Buffer*, 2019 IL 122327, ¶ 33 ("Practically, and ultimately, the prospect of geriatric release does not provide a juvenile with a meaningful opportunity to demonstrate the maturity and rehabilitation required to obtain release and reenter society.").

III. State constitutional claim

¶ 44 We separately address Kelliher's claim arising under article I, section 27 of the North Carolina Constitution, which provides in full that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted." N.C. Const. art. I, sec. 27. The State argues that article I, section 27 should be interpreted in lockstep with the Eighth Amendment—it contends that the protections afforded by article I, section 27 are coextensive with the Eighth Amendment, such that the United States Supreme Court's interpretation of the Eighth Amendment controls our interpretation of article I, section 27. Kelliher argues that both the text of article I, section 27 as well as unique considerations embodied in other provisions of the North Carolina Constitution should compel us to independently construe the scope of the protections afforded by our state's own constitution in this context.

¶ 45 We agree with Kelliher that article I, section 27 of the North Carolina Constitution offers protections distinct from, and in this context broader than, those provided under the Eighth Amendment. Accordingly, we hold that Kelliher's sentence is unconstitutional under article I, section 27 of the North Carolina Constitution, regardless of whether or not his sentence violates the Eighth Amendment.[5]

A. Article I, Section 27 is distinct from the Eighth Amendment

¶ 46 We first address the State's argument that article I, section 27 must be interpreted in lockstep with the Eighth Amendment. At the outset, we note the textual distinction between article I, section 27, which prohibits its punishment that is "cruel *or* unusual," and the Eighth Amendment, which prohibits punishment that is "cruel *and* unusual." Ordinarily, we presume that the words of a statute or constitutional provision mean what they say. *See, e.g.*, *State ex rel. Martin v. Preston*, 325 N.C. 438, 449 (1989) ("In interpreting our Constitution–as in interpreting a statute–where the meaning is clear from the words used, we will not search for a meaning elsewhere."). Thus, it is reasonable to presume that when the Framers of the North Carolina Constitution chose the words "cruel *or* unusual," they intended to prohibit punishment that was *either* cruel *or* unusual, consistent with the ordinary meaning of the disjunctive term "or." *See, e.g.*, *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 519 (2004) (explaining that the proper interpretation of a statute was influenced "by the use of the conjunctive term 'and' within the statute"); *In re Duckett's Claim*, 271 N.C. 430, 437 (1967) ("[T]he disjunctive participle 'or' is used to indicate a clear alternative. The second alternative is not a part of the first, and its provisions cannot be read into the first.").

¶ 47 That article I, section 27 is textually distinct from the Eighth Amendment suggests that the people of North Carolina intended to

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5. Several state courts have recognized that consecutive sentences imposed on juveniles are subject to *Graham* and *Miller*-type limits under their state constitution's analog to the Eighth Amendment or under their independent power to review sentences. *See, e.g.*, *Brown v. State*, 10 N.E.3d 1, 7–8 (Ind. 2014) (holding that *Miller* and *Graham* applied to 150-year aggregate sentence when acting pursuant to state constitutional authority to review and revise sentences); *State v. Null*, 836 N.W.2d 41, 74–77 (Iowa 2013) (explaining that the "[Constitution of Iowa] requires . . . recogniz[ing] and apply[ing] the core teachings of *Roper*, *Graham*, and *Miller* in making sentencing decisions for long prison terms involving juveniles . . . [and] consider[ing] whether the imposition of consecutive sentences would result in a prison term of such length that it [is] cruel and unusual punishment[.]"); *Commonwealth v. Perez*, 477 Mass. 677, 686 (2017) (holding that Massachusetts constitution requires *Miller*-hearing before imposing aggregate sentence exceeding the sentence that a juvenile would receive for murder).

provide a distinct set of protections in the North Carolina Constitution than those provided to them by the federal constitution. *Cf. People v. Bullock*, 440 Mich. 15, 31 n.11 (1992) ("[I]t seems self-evident that any adjectival phrase in the form 'A *or* B' necessarily encompasses a broader sweep than a phrase in the form 'A *and* B.' The set of punishments which are *either* 'cruel' or 'unusual' would seem necessarily broader than the set of punishments which are *both* 'cruel' and 'unusual.' "); *Commonwealth v. Concepcion*, 487 Mass. 77, 86, *cert. denied sub nom. Concepcion v. Massachusetts*, 142 S. Ct. 408 (2021) (stating that a Massachusetts constitutional provision proscribing cruel or unusual punishment "affords defendants greater protections than the Eighth Amendment does"). At least one Justice of this Court has previously expressed his adherence to this view. *See Medley v. N.C. Dep't of Correction*, 330 N.C. 837, 846 (1992) ("The disjunctive term 'or' in the State Constitution expresses a prohibition on punishments more inclusive than the Eighth Amendment.") (Martin, J., concurring). Given that our interpretation of the North Carolina Constitution always "begin[s] with the text," *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 2021-NCSC-6, ¶ 15, there is reason to confer interpretive significance on this textual distinction, *cf.* William W. Berry III, *Cruel and Unusual Non-Capital Punishments*, 58 Am. Crim. L. Rev. 1627, 1653 (2021) ("In many cases . . . the state constitutional language is different from the Eighth Amendment, and often in significant ways . . . . [T]hese linguistic differences provide the basis for broader, or at least different, coverage of state punishments.").

¶ 48 Further, even where a provision of the North Carolina Constitution precisely mirrors a provision of the United States Constitution, "we have the authority to construe our own constitution differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel provision." *State v. Carter*, 322 N.C. 709, 713 (1988); *see also State v. Arrington*, 311 N.C. 633, 642 (1984) ("In construing provisions of the Constitution of North Carolina, this Court is not bound by opinions of the Supreme Court of the United States construing even identical provisions in the Constitution of the United States."). Our independent authority to interpret state constitutional provisions reflects the unique role of state constitutions and state courts within our system of federalism. *See generally* Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* (2018). It also reflects the need to "give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and

security of the citizens in regard to both person and property." *Corum v. Univ. of N.C. Through Bd. of Governors*, 330 N.C. 761, 783 (1992); *see also* John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 37 (2d ed. 2013) ("[T]hese provisions [in N.C. Const. art. I] . . . empower the state courts to provide protections going even beyond those secured by the U.S. Constitution.").

¶ 49 Finally, the nature of the inquiry the United States Supreme Court has adopted in resolving cruel and unusual punishment claims itself suggests that state courts should not reflexively defer to United States Supreme Court precedent in assessing similar claims arising under distinct state constitutional provisions. As recounted above, Eighth Amendment doctrine assesses a challenged punishment by reference to practices in other jurisdictions, and ultimately requires a court to "determine in the exercise of its own independent judgment whether the punishment in question violates the [United States] Constitution." *Graham*, 560 U.S. at 61. Thus, even if we were to adhere to the United States Supreme Court's basic analytical framework, we might diverge from the Court in how that framework is applied. Although we have good reason to (and indeed must) defer to the "independent judgment" of the United States Supreme Court in assessing whether a punishment is cruel and unusual as judged against the standards embodied in the United States Constitution, "[t]his Court is the only entity which can answer with finality questions concerning the proper construction and application of the North Carolina Constitution." *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 474 (1999).

¶ 50 The constitutional text, our precedents illustrating this Court's role in interpreting the North Carolina Constitution, and the nature of the inquiry used to determine whether a punishment violates the federal constitution all militate against interpreting article I, section 27 in lockstep with the Eighth Amendment. In response, the State argues that this question was asked and answered in a previous case, *State v. Green*, 348 N.C. 588 (1998), which the State contends controls here. In *Green*, a case in which a defendant who was convicted of a first-degree sexual offense he committed at age thirteen challenged his sentence of life imprisonment, we noted the textual difference between article I, section 27 and the Eighth Amendment but observed that "this Court historically has analyzed cruel and/or unusual punishment claims by criminal defendants the same under both the federal and state constitutions." *Green*, 348 N.C. at 603. In a footnote, we also explained that we would not at that time adopt Justice Martin's argument regarding the significance of article I, section 27's use of the disjunctive term "or" because "research

reveals neither subsequent movement toward [Justice Martin's] position by either this Court or the Court of Appeals nor any compelling reason to adopt such a position." *Id.* at 603 n.1.

¶ 51 Although these excerpts from *Green* illustrate how this Court approached article I, section 27 at the time that case was decided, the State's argument that *Green* requires us to approach article I, section 27 the same exact way today misses the mark. *Green*'s reasoning is starkly inconsistent with contemporary understandings of adolescence which have been recognized by this Court. For example, in *Green* we reasoned that the defendant's youth did not render his sentence disproportionate in part because

> the number of years a defendant has spent on this planet is not solely determinative of his "age." Due to factors such as life experience, knowledge level, psychological development, criminal familiarity, and sophistication and severity of the crime charged, a criminal defendant may be deemed to possess the wisdom and age of individuals considerably older than his chronological age.

348 N.C. at 610 (citations omitted). Yet, as we recognized in *State v. James*, a juvenile's "chronological age and its hallmark features" undermine the penological justifications for imposing extreme sentences on the vast majority of juveniles. 371 N.C. at 96 (quoting *Miller*, 567 U.S. at 477).[6] In *Green*, we stated that an interest in the "protection of law-abiding citizens from their predators, regardless of the predators' ages, is on the ascendancy in our state and nation." 348 N.C. at 608. We now recognize that our practice of describing children as "predators" fundamentally misapprehended the nature of childhood and, frequently, reflected racialized notions of some children's supposedly inherent proclivity to commit crimes. *See The Superpredator Myth, 25 Years Later*, Equal Just. Initiative (Apr. 7, 2014), https://eji.org/news/superpredator-myth-20-years-later/); *see also State v. Null*, 836 N.W.2d 41, 56 (Iowa 2013) (noting that the propagators of the juvenile "predator" theory ultimately acknowledged that "the[ir] predictions did not come to pass, that juvenile crime rates had in fact decreased over the recent decades,

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6. It is notable that the juvenile offender in *Green*, Andre Demetrius Green, "came from a home where his father was an alcoholic and cocaine abuser who provided no support for the family and had little contact with defendant as a child." *State v. Green*, 348 N.C. 588, 593 (1998). Today, these circumstances would certainly be relevant if he were to be resentenced.

that state legislative actions in the 1990s were taken during 'an environment of hysteria featuring highly publicized heinous crimes committed by juvenile offenders,' and that recent scientific evidence and empirical data invalidated the juvenile superpredator myth."); *State v. Belcher*, 342 Conn. 1, 13–14 (2022) ("[A] review of the superpredator theory and its history demonstrates that the theory constituted materially false and unreliable information. . . . Extensive research data and empirical analysis quickly demonstrated that the superpredator theory was baseless."). As *Green* itself recognized, our decision in that case was very much a product of its time. 348 N.C. at 608 ("Similarly, it is the general consensus that serious youthful offenders must be dealt with more severely than has recently been the case in the juvenile system. These tides of thought may ebb in the future, but for now, they predominate in the arena of ideas."). We conclude today that *Green*'s time has passed; our emerging science-based understanding of childhood development necessitates abandoning its reasoning.[7]

¶ 52 The State's other argument against this Court independently construing article I, section 27 is that our doing so treads upon the prerogatives of the legislature acting on behalf of the people of North Carolina. According to the State, because "[t]he imposition of consecutive life with parole sentences is permissible according to the sentencing scheme enacted by our legislature," and because United States Supreme Court jurisprudence on this matter is unsettled, we should "not be persuaded that the North Carolina Constitution requires a broader approach to juvenile sentencing" than the approach required by the Eighth Amendment. But as we long ago established and have since repeatedly affirmed, the fact that the legislature has enacted a statute does not guarantee its constitutionality as applied in all circumstances; interpreting constitutional provisions is a quintessential judicial function. *See*, *e.g.*, *Bayard v. Singleton*, 1 N.C. 5 (1787); *McCrory v. Berger*, 368 N.C. 633 (2016). While we always presume that the legislature has acted within constitutional bounds, it is this Court's "solemn obligation" to invalidate statutes which violate the North Carolina Constitution, and our authority to do so is "too firmly sanctioned . . . to be questioned." *Stanmire*

7. To be clear, for the reasons stated above, we do not believe *Green* is binding precedent with respect to the question of how to interpret article I, section 27 in relation to the Eighth Amendment. However, even if it were, we believe the circumstances would justify departing from *Green* in light of that decision's outdated reasoning about adolescence and subsequent decisions disavowing its central holding. *Cf. N. Carolina Farm Bureau Mut. Ins. Co., Inc. v. Dana*, 2021-NCSC-161, ¶ 32 (Earls, J., concurring) (describing the factors to consider when determining if a challenged precedent should be respected under the doctrine of stare decisis).

v. Taylor, 48 N.C. 207, 211 (1855). Ultimately, "[q]uestions concerning the proper construction and application of the North Carolina Constitution can be answered with finality only by this Court." *State v. Jackson*, 348 N.C. 644, 648 (1998).

¶ 53 For these reasons, we conclude that article I, section 27 of the North Carolina Constitution need not be interpreted in lockstep with the Eighth Amendment to the United States Constitution. Although we give "the most serious consideration" to United States Supreme Court decisions and may "in our discretion . . . conclude that the reasoning of such decisions is persuasive," *State v. Jackson*, 348 N.C. 644, 648 (1998), we must strive to give effect to the choices the people of North Carolina made in constructing and adopting North Carolina's own Constitution reflecting North Carolinians' own aspirations and concerns. That includes giving effect to the people of North Carolina's choice to prohibit all punishments that are either cruel *or* unusual. Accordingly, we now turn to the North Carolina Constitution to define the protections afforded by article I, section 27.

B. State constitutional principles

¶ 54 Although the two provisions need not be interpreted in lockstep, the Eighth Amendment to the United States Constitution and article I, section 27 of the North Carolina Constitution do share one important similarity: neither precisely defines the terms "cruel" or "unusual." *See State v. Driver*, 78 N.C. 423, 429 (1878) (explaining that while the North Carolina Constitution does impose "a limit to the power of the [j]udge to punish . . . [w]hat the precise limit is, cannot be prescribed"). What is clear from the plain meaning of both terms is that determining whether a punishment is "cruel" or "unusual" requires a contextual inquiry, the results of which may change over time as society evolves. Thus, we are persuaded that, at this time, there is no reason to depart from the basic Eighth Amendment analytical framework as articulated by the United States Supreme Court in cases like *Trop* and *Graham* and described above. We draw the meaning of article I, section 27 "from the evolving standards of decency that mark the progress of a maturing society," *Trop*, 356 U.S. at 100–01, and we consider "objective indicia of society's standards" when we "exercise [our] own independent judgment [to decide] whether the punishment in question violates the Constitution," *Graham*, 560 U.S. at 61.

¶ 55 However, in exercising our independent judgment to assess a punishment under article I, section 27, we must also consider features unique to the North Carolina Constitution. This includes constitutional

provisions appearing in the North Carolina Constitution which have no federal counterpart and which bear on the interpretation of article I, section 27. *See Stephenson v. Bartlett*, 355 N.C. 354, 378 (2002) ("[A]ll constitutional provisions must be read *in pari materia*."). Therefore, our interpretation of article I, section 27 is informed by other provisions of the North Carolina Constitution addressing the purposes of criminal punishment and the rights of North Carolina's juveniles. We conclude that in light of provisions of the North Carolina Constitution not found in the United States Constitution, sentencing a juvenile who is neither incorrigible nor irredeemable to life without parole is cruel within the meaning of article I, section 27.

¶ 56 First, sentencing a juvenile who can be rehabilitated to life without parole is cruel because it allows retribution to completely override the rehabilitative function of criminal punishment. Although the United States Supreme Court also relied on its account of the penological justifications for punishment in holding certain sentences unconstitutional as applied to juveniles, the North Carolina Constitution is unique in expressly providing that "[t]he object of punishments" in North Carolina are "not only to satisfy justice, *but also to reform the offender* and thus prevent crime . . . ." N.C. Const. Art. XI, § 2 (emphasis added). A punishment which consigns an offender to spend his or her entire life in prison is plainly unconcerned with "reform[ing] the offender." In the context of an adult defendant, such a punishment can typically be justified—either because the nature of the defendant's crimes means "justice" requires such a harsh sentence, or because the State has concluded that adults who commit certain of the most egregious criminal offenses cannot possibly be "reform[ed]."

¶ 57 However, with "exceedingly rare" exceptions, that logic does not hold when dealing with juvenile offenders. *James*, 371 N.C. at 97. Because juveniles have less than fully developed cognitive, social, and emotional skills, they have lessened moral culpability for their actions as compared to adults. *Id.* at 96. Because juveniles are inherently malleable, they have a greater chance of being rehabilitated as compared to adults. Further, juveniles who become involved in the criminal justice system are disproportionately likely to have experienced various childhood traumas, such as Adverse Childhood Experiences (ACEs), which demonstrably impair their cognitive processing and may be expressed, as ably summarized in an amicus brief by Disability Rights North Carolina, "by the early onset of risk behaviors, dysregulation of biological stress systems, alterations in brain anatomy and function, suppression of the immune system, and potential alterations in the child's epigenome." Sentencing the vast

majority of juvenile offenders to spend their lives in prison is unjustifiable given the "object of punishments" as defined by article XI, section 2. Given juveniles' diminished moral culpability, it is unjustifiably retributive; given juveniles' heightened capacity for change, it unjustifiably disavows the goal of reform. Punishment which does not correspond to the penological functions enumerated in North Carolina's Constitution is cruel.

¶ 58 Second, sentencing a juvenile who can be rehabilitated to life without parole is cruel because it ignores North Carolina's constitutionally expressed commitment to nurturing the potential of all our state's children. This commitment is enumerated in two different provisions of our constitution: article I, section 15, which states that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right," and article IX, section 1, which states that "[r]eligion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged." Our constitution's recognition that "[t]he promotion of education generally, and educational opportunity in particular, is of paramount public importance to our state" reflects the understanding that "our collective citizenry" benefits when all children are given the chance to realize their potential. *Hart v. State*, 368 N.C. 122, 138 (2015). Of course, a child who commits a homicide will, justifiably, be denied many life opportunities afforded to other children. But even the child who commits a homicide can, with "exceedingly rare" exceptions, eventually hope to acquire the knowledge, skills, and self-awareness needed to develop into a different kind of person, someone who can make a positive contribution to "our collective citizenry." In light of our constitutional commitment to helping all children realize their potential and our recognition of the interest of all North Carolinians in so doing, it is cruel to sentence a juvenile who has the potential to be rehabilitated to a sentence which deprives him or her of a meaningful opportunity to reenter society and contribute to this state.

¶ 59 To summarize, we hold that sentencing a juvenile who can be rehabilitated to life without parole is cruel within the meaning of article I, section 27 of the North Carolina Constitution. Our conclusion that juvenile life without parole is cruel is bolstered by the recognition that "the United States is the only country in the world that imposes juvenile life without parole sentences; such sentences are banned in every other country and prohibited by human rights treaties." Ben Finholt et. al, *Juvenile Life Without Parole in North Carolina*, 110 J. Crim. L. & Criminology 141, 143 (2020). It is also bolstered by empirical data demonstrating that an individual juvenile offender's chances of receiving

a sentence of life without parole may be at least partially attributable to factors that are not salient in assessing the penological appropriateness of a sentence, such as race, socioeconomic status, and geography. *See*, *e.g.*, *id.* at 163 (describing results of regression analysis showing that juvenile life without parole sentences "are more likely . . . in North Carolina counties with a black population that is above average (20.9%) and in counties where the poverty rate is below average (16.1%)"). In addition, based on the science of adolescent brain development that this Court has previously recognized and our constitutional commitments to rehabilitating criminal offenders and nurturing the potential of all of North Carolina's children, we also conclude that juvenile offenders are presumed to have the capacity to change. "[L]ife without parole sentences for juveniles should be exceedingly rare and reserved for specifically described individuals," that is, those who cannot be rehabilitated. *James*, 371 N.C. at 96–97. Thus, unless the trial court expressly finds that a juvenile homicide offender is one of those "exceedingly rare" juveniles who cannot be rehabilitated, he or she cannot be sentenced to life without parole.

C. De facto life without parole is cognizable under Article I, Section 27

¶ 60 In this case, because the trial court found that he was "neither incorrigible nor irredeemable," Kelliher cannot be sentenced to life without parole consistent with article I, section 27 of the North Carolina Constitution. But Kelliher was not technically sentenced to life without parole; he was given two consecutive sentences of life with parole, each requiring him to serve twenty-five years in prison before becoming eligible for parole. Furthermore, Kelliher did not raise an as-applied claim asserting that his sentence was constitutionally disproportionate based on the particular circumstances of his case. Rather, Kelliher has argued that it is facially unconstitutional under article I, section 27 to sentence any juvenile who can be rehabilitated to life without parole, and that he is among the class of juveniles for whom such a sentence is forbidden. Thus, to prevail on his state constitutional claim, Kelliher must also establish that his sentence of a term of fifty years in prison before becoming eligible for parole is a de facto sentence of life without parole—otherwise, he has not received a sentence which, under his own theory, violates article I, section 27.

¶ 61 Our recognition that article I, section 27 prohibits the imposition of a sentence of life without parole for almost all juvenile offenders is rooted in the insight that juvenile offenders are different from adult criminal defendants in ways that are significant with respect to extreme sentences.

What makes the juvenile offender different is the fact that he or she is a child, not the nature or number of the crimes he or she has committed. Indeed, the fact that the juvenile committed multiple crimes (as opposed to a single offense) itself likely reflects distinctive features of youth. A child who commits multiple criminal offenses is no less a child than a child who commits a single criminal offense or a child who commits none. *Cf. State v. Moore*, 76 N.E.3d 1127, 1142 (Ohio 2016) ("Whether the sentence is the product of a discrete offense or multiple offenses, the fact remains that it was a *juvenile* who committed the one offense or several offenses and who has diminished moral culpability."). The protections afforded by article I, section 27 that are applicable to Kelliher emanate from his status as within a category of offenders understood to have diminished moral culpability. The fact that he committed multiple offenses does not change the fact that he was, at the time he committed those offenses, a child understood to be less morally culpable for his actions than an adult. These distinctive features of youth compel us to recognize that a sentence which deprives a juvenile of any genuine opportunity to earn his or her release by demonstrating that he or she has been rehabilitated is, in effect if not in name, a sentence of life without parole within the meaning of article I, section 27.

¶ 62 A genuine opportunity requires both some meaningful amount of time to demonstrate maturity while the juvenile offender is incarcerated and some meaningful amount of time to establish a life outside of prison should he or she be released. As the Court of Appeals correctly noted, "[s]everal courts have held *de facto* [life without parole] sentences that do not conclusively extend beyond the juvenile's natural life are nonetheless unconstitutional sentences, and many of them have found such sentences to exist when release (either through completion of the sentence or opportunity for parole) is only available after roughly 50 years, and sometimes less." *Kelliher*, 273 N.C. App. at 641 (collecting cases); *see also Carter v. State*, 461 Md. 295, 352 (2018) ("Many courts have concluded that a sentence of a term of years that precludes parole consideration for a half century or more is equivalent to a sentence of life without parole."). Indeed, a clear majority of jurisdictions to consider this issue recognize de facto life without parole sentences as cognizable under the Eighth Amendment or independent state constitutional provisions which therefore may warrant relief under *Graham* and *Miller* or similar state-law principles. *See Kelliher*, 273 N.C. App. at 641; *see also State v. Haag*, 198 Wash. 2d 309, 327 (2021) (concluding that a 46-year sentence is de facto life without parole because it deprives a juvenile offender of a meaningful opportunity to reenter society and have a meaningful life); *State ex. rel Carr v. Wallace*, 527 S.W.3d 55, 63–64 (Mo. 2017)

(concluding that mandatory concurrent sentences with parole eligibility after 50 years constituted a de facto life without parole sentence subject to *Miller*'s sentencing requirements); *Bear Cloud v. State*, 334 P.3d 132, 141-42 (Wy. 2014) (concluding that consecutive sentences, including a life sentence for homicide, providing parole eligibility after 45 years was de facto life without parole sentenced controlled by *Miller*); *Casiano v. Comm'r of Corr.*, 115 A.3d 1031, 1047–48 (Conn. 2015) (concluding that a juvenile's 50 year sentence before parole eligibility was a de facto life without parole sentence controlled by *Miller*). We agree with the Court of Appeals that a sentence of fifty years before being eligible to be considered for parole denies a meaningful opportunity for release for several reasons.

¶ 63 First, a fifty-year sentence means there is a distinct possibility that a juvenile offender will not live long enough to have the opportunity to demonstrate that he has been rehabilitated. Notably, the United States Sentencing Commission has defined "a sentence length of 470 months or longer," or 39 years and two months, as a de facto life sentence because this sentence is "consistent with the average life expectancy of federal criminal offenders." United States Sentencing Commission, *Life Sentences in the Federal System* (February 2015), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226_Life_Sentences.pdf.

¶ 64 Moreover, juvenile offenders like Kelliher are distinct from the average person of equivalent age. They are both disproportionately likely to have experienced multiple and often severe childhood traumas, and they will spend the vast majority of their lives within the walls of a prison. Both of these circumstances can significantly reduce an individual's life expectancy. *See* Naja H. Rod, et al, *Trajectories of childhood adversity and mortality in early adulthood*: *a population-based cohort study*. 396 (No. 10249) Lancet, 489–97 (2020) (finding that children who experience multiple adverse experiences "had a 4.54 times higher all-cause mortality risk . . . than that of children with a low adversity trajectory" with the most common causes of death being "accidents, suicides, and cancer"); *see also Michigan Life Expectancy Data for Youth Serving Natural Life Sentences* 2 (finding that the average life expectancy for juveniles who received natural life sentences was 50.6 years), http://www.lb7.uscourts.gov/documents/17-12441.pdf. Thus, in general, sentencing a juvenile offender to fifty years in prison means he or she will die in prison before ever having the chance to go before the Parole Commission.

¶ 65 Second, a fifty-year sentence means that even if the juvenile offender is released from prison, he or she will have little chance of reintegrating

into society in any meaningful way. Having spent at least five decades in prison, a juvenile offender released on parole will face overwhelming challenges when attempting to obtain employment, secure housing, and establish ties with family members or the broader community. *See, e.g.*, Kelly Elizabeth Orians, *"I'll Say I'm Home, I Won't Say I'm Free": Persistent Barriers to Housing, Employment, and Financial Security for Formerly Incarcerated People in Low Income Communities of Color*, 25 Nat'l Black L. J. 23, 25–26 (2016) ("[R]esearch has also found dramatic unemployment rates amongst formerly incarcerated people, in some cases as high as 77 percent after the first year of release."). Juveniles who enter prison at a young age and exit decades later will need to navigate all the difficulties inherent in reentry after being incarcerated, in the context of a dramatically different society than the one they remember. *Cf. People v. Contreras*, 4 Cal. 5th 349, 368 (2018) (requiring juvenile to serve fifty years before parole eligible does not provide "sufficient period to achieve reintegration as a productive and respected member of the citizenry"). Given these difficulties—and the diminished life expectancy of a juvenile offender who has spent five decades in prison—a fifty-year sentence deprives juvenile offenders of any real chance of establishing an independent life upon reentering society.

¶ 66 Having determined that fifty years is a de facto life without parole sentence, we are still faced with the question of how long is too long. We acknowledge that fixing the boundary between a lengthy but constitutionally permissible sentence and an unconstitutional de facto life without parole sentence necessarily requires an exercise of judgment. But it is the role of this Court to "give[ ] specific content" to state constitutional provisions. Orth & Newby at 37. We conclude that in light of the requirements of article I, section 27 and the practical realities as experienced by juvenile offenders recounted above, any sentence or sentences which, individually or collectively, require a juvenile to serve more than forty years in prison before becoming eligible for parole is a de facto sentence of life without parole within the meaning of article I, section 27.

¶ 67 The Court of Appeals held that any sentence or combination of sentences exceeding twenty-five years before parole eligibility constituted a de facto sentence of life without parole. *Kelliher*, 273 N.C. App. at 643. In reaching this conclusion, the Court of Appeals relied principally on the fact that, following *Miller*, the General Assembly established that a juvenile who is convicted of first-degree murder "shall serve a minimum of 25 years imprisonment prior to becoming eligible for parole." *Id.* (citing N.C.G.S. § 15A-1340.19A). Although other state courts have looked to their own *Miller*-fix statutes in defining what constitutes a sentence of de facto life without parole, *see e.g.*, *People v. Buffer*, 2019

IL 122327, ¶ 40, 137 N.E.3d 763, 774, we cannot do so here because the North Carolina statute is silent on how to sentence multiple counts of premeditated murder.[8]

¶ 68 Instead, we acknowledge that the General Assembly's silence on this question leaves it as a matter of constitutional interpretation. The fact that the legislature has not spoken cannot relieve us of the obligation to interpret and apply the state constitution's guarantee of protection from cruel or unusual punishment in the context of all the other state constitutional provisions that have relevance here. We identify forty years as the threshold distinguishing a permissible sentence from an impermissible *de facto* life without parole sentence for juveniles not found to be irredeemable, based upon our understanding of the minimum amount of time necessary to assure most juvenile offenders are afforded a genuine opportunity to demonstrate they have been rehabilitated and, if released, to establish a meaningful life outside prison walls.

¶ 69 We reach this conclusion for several reasons. First, a maximum of forty years of pre-parole eligibility strikes a balance between two competing—though not equally weighty—interests: our interest in respecting the legislature's choice to afford trial courts the discretion to run multiple sentences either concurrently or consecutively, *see* N.C.G.S. § 15A-1354(a), and our obligation to enforce the constitutional prohibition on "cruel or unusual punishment." N.C. Const. art. I, § 27; *see State v. Conner*, 2022-NCSC-79, ¶ 61. A maximum of forty years before parole eligibility still allows trial courts to sentence juvenile offenders to multiple consecutive sentences if they have committed multiple crimes (up to 40 years in prison before parole eligibility), while also accounting for the hallmark differences between children and adults noted above that dilute the penological justifications for imposing extreme punishments on juvenile offenders.

¶ 70 A forty-year maximum term before parole eligibility also supports the rehabilitative goal of criminal punishment. We agree with the United States Supreme Court that for rehabilitation to occur, juvenile offenders "must be given the opportunity to show their crime did not reflect irreparable corruptions; and, if it did not, their hope for some years of life

8. Other states have found legislative indications of what sentence would provide a meaningful opportunity to obtain release in state statutes that provide for parole eligibility at age sixty even when a defendant is sentenced to life without parole. *See Carter v. State*, 461 Md. 295, 356 (2018) ("In considering any of these benchmarks, we must also keep in mind that the Supreme Court has equated the 'meaningful opportunity for release based on demonstrated maturity and rehabilitation' with a 'hope for some years of life outside prison walls.' ") (citing *Montgomery v. Louisiana*, 577 U.S. 190, 213 (2016)).

outside prison walls must be restored." *Montgomery*, 577 U.S. at 213. It is cruel to sentence a juvenile who has the potential to be rehabilitated to a sentence which deprives him or her of a meaningful opportunity to reenter society and contribute to our state. *Cf. Naovarath v. State*, 105 Nev. 525, 526 (1989) ("All but the deadliest and most unsalvageable of prisoners have the right to appear before the board of parole to try and show that they have behaved well in prison confines and that their moral and spiritual betterment merits consideration of some adjustment of their sentences. Denial of this vital opportunity means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [a juvenile offender] he will remain in prison for the rest of his days."). Establishing a constitutional maximum of 40 years of before parole eligibility ensures that juvenile offenders will indeed have a realistic hope of a meaningful opportunity for reentry.

¶ 71 As an initial matter, life expectancy data suggests that a forty-year pre-parole eligibility maximum will provide juvenile offenders with a realistic hope of meaningful years of life outside prison walls. Because the oldest offenders considered juveniles are seventeen years old, a forty-year term would mean that a juvenile offender will—at latest—be initially eligible for parole beginning at the age of fifty-seven. Although statistics indicate that nearly all fifty-seven-year-olds have more years behind them than in front of them, the opportunity for parole at age fifty-seven nevertheless adequately ensures that such offenders may hold a realistic "hope for some years of life outside prison walls." This demarcation aligns with data from the U.S. Sentencing Commission noted above, which defines a sentence of at least 39 years and two months as a de facto life sentence.

¶ 72 Notably, ensuring that juvenile offenders maintain a realistic hope of some meaningful years of life outside of prison encourages personal development and pro-social behaviors during incarceration, such as furthering one's education, gaining technical or professional skills, and maintaining bonds with friends and loved ones. *Cf. Contreras*, 4 Cal. 5th at 368 ("[A] juvenile offender's prospect of rehabilitation is not simply a matter of outgrowing the transient qualities of youth; it also depends on the incentives and opportunities available to the juvenile going forward."). This stands in stark contrast to a rule that would base the constitutional line solely upon life expectancy, which would functionally—and cruelly—seek to extract the maximum amount of punishment out of juvenile offenders before releasing them sometime shortly before their expected death. *See Graham*, 560 U.S. at 79 ("A young person who knows that he or she has no chance to leave prison before life's end has

little incentive to become a responsible individual."); *see also* Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 Wake Forest L. Rev. 681, 712–714 (1998) (describing the "hopelessness and despair" experienced by juvenile offenders serving life sentences who additionally face "far greater risk of physical—and sexual—assault by older, more mature offenders"). Such a rule would thwart rather than further the rehabilitative function of punishment.

¶ 73 Employment data likewise supports this constitutional limit. In addition to "life, liberty, . . . and the pursuit of happiness," our state Constitution enshrines all people with another fundamental right: "the enjoyment of the fruits of their own labor." N.C. Const. Art. I, § 1. This constitutional provision, "although perhaps aimed originally at slavery," has provided the basis for constitutional challenges against undue restraints on employment. Orth & Newby at 46; *see also State v. Harris*, 216 N.C. 746, 759 (1940) (a law that destroys the opportunity to make a living is "a legal grotesquery"). Although they will face significant barriers, juvenile offenders who have the opportunity for parole eligibility after forty years nevertheless may maintain a realistic hope that they may be able to engage in gainful employment (and enjoy its subsequent fruits) upon release from incarceration, as two existing employment legal frameworks—social security and state retirement benefits—illustrate.

¶ 74 In the social security administrative context, "medical-vocational guidelines, commonly referred to as 'grids,' distill and consolidate long-standing medical evaluation policies employed in disability determinations." *Henderson v. North Carolina Dep't of Human Resources, Div. of Social Services*, 91 N.C. App. 527, 534 (1988). These grids "identify job requirements, interrelate a claimant's physical ability with his age, education, and previous work experience, and direct a conclusion whether work exists that the claimant could perform." *Id.*; *see*, *e.g.*, *Barnhart v. Thomas*, 540 U.S. 20, 23-24 (2003) (summarizing the Social Security Administration's disability determination process); *Harvey v. Heckler*, 814 F.2d 162, 164 (4th Cir. 1987) (same).

¶ 75 While social security eligibility determinations are inherently fact-specific, the grids and their accompanying guidelines provide useful context regarding the impact of age, education, and work experience on employment prospects. For instance, "[a]dvanced age [(55 and over)] and a history of unskilled work or no work experience would ordinarily offset any vocational advantages that might accrue by reason of any remote past education, whether it is more or less than limited education." CFR Appendix 2 to Subpart P of Part 404 – Medical-Vocational Guidelines, § 200.00(d) (https://www.ssa.gov/OP_Home/cfr20/404/404-app-p02.htm).

By contrast, "[t]he presence of acquired skills that are readily transferable to a significant range of skilled work within an individual's residual functional capacity would ordinarily warrant a finding of ability to engage in substantial gainful activity regardless of the adversity of age, or whether the individual's formal education is commensurate with his or her demonstrated skill level." *Id.* at § 200.00(e). Generally, a person of advanced age, who is limited to sedentary work, with limited or less education, and unskilled or no work experience, is deemed disabled and without employment prospects. *Id.* at § 201.01.

¶ 76 In the context of juvenile sentencing, these guidelines support establishing a forty-year maximum term before parole eligibility for juvenile offenders. First, the physical and mental impacts of a decades-long period of incarceration could reasonably be considered a disabling condition, or at least a significant barrier to future employment. Next, juvenile offenders are unlikely to have access to robust advanced educational opportunities while incarcerated. Likewise, juvenile offenders are unlikely to have access to many skilled labor opportunities while incarcerated. As such, the social security guidelines suggest that the closer a juvenile offender gets to "advanced age," the less likely he is to be able to find gainful employment upon release. However, the guidelines suggest that with the benefit of some education and work experience while incarcerated, juvenile offenders with the opportunity for parole after forty years may nevertheless maintain a realistic hope that they will be able to find meaningful employment upon their reentry into society.

¶ 77 The employment rationale is further supported by a second existing legal framework: North Carolina state retirement eligibility. As the Court of Appeals noted, other states have also looked at retirement age in assessing whether a sentence for a redeemable juvenile is a *de facto* life without parole sentence. *Kelliher*, 273 N.C. App. at 641. Under North Carolina law, a person may retire with unreduced retirement benefits after 30 years of creditable work with the state at any age, after 25 years of creditable work at age 60, and, most importantly, after five years of creditable work with the state at age 65. *See* N.C.G.S. § 135-5(b21)(2)(a). Accordingly, under our state retirement system, the minimum career recognized by law to entitle one to retirement with benefits is five years of employment at age 65. In general, across all sectors, the average retirement age in North Carolina is 63. *See* Average Retirement Age by State, https://worldpopulationreview.com/state-rankings/average-retirement-income-by-state.

¶ 78 As this data illustrates, a sentence consigning a juvenile to prison after age 60 will prevent that juvenile from completing what the people of

our state consider to be a minimal career of service in time to also retire at age 65. If a meaningful opportunity for life after release must provide for "hope" and a chance for "fulfillment outside prison walls," "reconciliation with society," and "the opportunity to achieve maturity of judgment and self-recognition of human worth and potential," *Graham*, 560 U.S. at 79, then providing some opportunity for a non-incorrigible juvenile offender to seek to work for a living upon release is necessary. Our constitution, statutes, and demographic data demonstrate that a sentence deprives a person of a meaningful opportunity to work if they are not eligible for parole before they turn sixty years old. Recognizing that an individual released from custody after having spent their entire adult life in prison will need some time to acquire a job, juveniles sentenced to more than 40 years' incarceration will not have a meaningful opportunity to work as that is understood under North Carolina law.

¶ 79 To be clear, our interpretation of what constitutes cruel or unusual punishment as applied to a juvenile offender does not extend to the context of adult offenders. Our decision to recognize the de facto life without parole doctrine in this case does not disturb our previous statements addressing sentences imposed on adult criminal defendants that "[t]he imposition of consecutive life sentences, standing alone, does not constitute cruel or unusual punishment" and that "[a] defendant may be convicted of and sentenced for each specific criminal act which he commits." *State v. Ysaguire*, 309 N.C. 780, 786 (1983). As we have explained, it is the unique characteristics of youth—and the specific ways those unique characteristics relate to the penological justifications for imposing punishment—that render consecutive life sentences cruel as applied to juvenile offenders. A child who commits multiple offenses is still a child, and the constitutionally salient features of youth with respect to sentencing cannot be disregarded.

¶ 80 Further, our recognition of the de facto life without parole doctrine does not dispossess the trial court or other decisionmakers in the criminal justice system of their discretion to weigh the circumstances surrounding a juvenile offender's conduct, including the number of offenses committed, in deciding that juvenile's ultimate fate. These circumstances are likely to be relevant in the district attorney's initial charging decision, in the jury's deliberations, in the sentencing court's initial determination of whether the juvenile can be rehabilitated, in the Parole Commission's disposition of an offender's request for release, and in the Governor's decision to grant or deny a clemency petition. "[T]he fact that the defendants were convicted of multiple crimes may well be relevant in the analysis of individual culpability" when assessing

whether or not a juvenile homicide offender is one of the rare juveniles who cannot be rehabilitated, *Null*, 836 N.W.2d at 73, but the fact that a juvenile offender was convicted of multiple crimes is not, on its own, sufficient to consign that juvenile to life in prison from the outset.

¶ 81 Finally, it bears repeating that an opportunity for consideration for parole is no guarantee that parole will ever be granted. Instead, a decision regarding whether a juvenile offender serving a life sentence will be released will be made based on the factors and circumstances present at the most relevant time. Recognizing that our state constitution's prohibition of cruel or unusual sentences applies to de facto life without parole sentences merely provides that consideration of the possibility of parole can be made at a time when the non-incorrigible offender has a meaningful opportunity to work and contribute to society.

¶ 82 Ultimately, the forty-year threshold reflects our assessment of the various relevant constitutional and penological considerations in view of the best available data regarding the general life expectancy of juveniles sentenced to extremely lengthy prison sentences, including the United States Sentencing Commission report.[9] As noted above, determining the boundary between a lengthy but constitutionally permissible sentence and an unconstitutional de facto life without parole sentence necessarily requires an exercise of judgment. Although none of the data or other legal frameworks detailed above are determinative, these sources of information—in tandem with broader considerations of penological interests, modern understandings of juvenile development, and the evolving standards of decency that mark the progress of a maturing society— usefully inform our application of the constitutional protections at issue here.

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9. Attempting to use more individualized life-expectancy data based on gender and race to assess what sentence might be constitutional for a particular juvenile could raise significant practical and constitutional concerns. Therefore, we decline to do so. *See* Adele Cummings & Stacie Nelson Colling, *There is No Meaningful Opportunity in Meaningless Data: Why It Is Unconstitutional to Use Life Expectancy Tables in Post-Graham Sentences*, 18 U.C. Davis J. Juvenile L. & Policy 267, 282 (2014) (explaining that life expectancy is affected by many "variables that have long been studied by social scientists but are not included in U.S. Census or vital statistics reports—income, education, region, type of community, access to regular health care, and the like . . . .") In 2020, for example, the life expectancy gap between non-Hispanic whites and non-Hispanic blacks was 5.8 years; the gap between men and women was 5.7 years. Center for Disease Control, Vital Statistics Rapid Release, Number 015 (July 2021), https://www.cdc.gov/nchs/data/vsrr/vsrr015-508.pdf. Sentences based on race and gender differences could raise equal protection problems. *See United States v. Mathurin*, 868 F.3d 921, 932 (11th Cir. 2017) (explaining problems with using mortality tables in this context).

IV. Conclusion

¶ 83 The crimes Kelliher committed and the pain he caused are irrevocable. He can never replace what he took from Carpenter, Helton, their friends and families, and the entire community of this state. He will spend decades of his life, and perhaps the remainder of his life, in prison for his actions. But article I, section 27 of the North Carolina Constitution does not permit us to ignore his potential for change. He cannot be deprived the opportunity to demonstrate that he has become someone different than the person he was when he was seventeen years old and at his worst. For the foregoing reasons, and based specifically on our analysis of the independent protections afforded by article I, section 27 of the North Carolina Constitution, the judgment of the Court of Appeals is modified and affirmed. Although we would ordinarily leave resentencing to the trial court's discretion, we agree with the Court of Appeals that "of the two binary options available—consecutive or concurrent sentences of life with parole—one is unconstitutional." *Kelliher*, 273 N.C. App. at 644. Accordingly, we remand to the trial court with instructions to enter two concurrent sentences of life with parole.

MODIFIED AND AFFIRMED.

Chief Justice NEWBY dissenting.

¶ 84 Judicial activism is "[a] philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usu[ally] with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore governing texts and precedents." *Judicial activism*, *Black's Law Dictionary* (11th ed. 2019). It is difficult to imagine a more appropriate description of the action that the majority takes today.

¶ 85 What range of punishment is appropriate for someone who participates in the brutal execution of multiple people? What branch of government is designed to enact criminal justice policy? Today this Court, in a blatant stroke of judicial activism, decides that it will legislate criminal justice policy. It determines the maximum sentence for a seventeen-year-old who killed multiple people is the same as if he had killed only one. It boldly declares that any harsher penalty is unconstitutionally "cruel." The majority legislates this sentence not through judicial review but by its own determination of "evolving societal standards" and its desire to bring North Carolina in line with its view of international law and what some other states have done. In doing so, the majority casually

disregards decades of our precedents and ignores the plain language of various constitutional provisions.

¶ 86 The majority's holding today sets dangerous criminal policy. It devalues human life by artificially capping sentences for offenders who commit multiple murders. Its decision feeds the growing trend of gangs using younger members to do their killings as they recognize the leniency of criminal sentencing of minors. Further, this decision removes any incentive to limit the murder of witnesses at the crime scene.

¶ 87 During this time of rising juvenile violence, should this Court radically change criminal sentencing policy? The majority's tunnel view, which focuses on the age of the murderer without considering the number or brutality of the crimes, removes sentencing discretion from the trial court—the opposite of what United States Supreme Court precedents require. Further, limiting punishment based solely on age ignores other important circumstances. What about those who commit school shootings? Or those on a multiday crime spree who commit multiple murders on separate occasions? The majority's fixation on age to the exclusion of all else says all juvenile murderers will be treated the same—parole eligible after twenty-five years.

¶ 88 What is "cruel" in this case is not the punishment for the crimes but the tragic irreparable loss because of the murder of a young man and his pregnant girlfriend and the ongoing anguish of the victims' families. Now the families are left to wonder: For which murder is defendant escaping punishment?

¶ 89 Here the trial court did precisely what the constitution and relevant statutes required it to do: it considered the fact that defendant was not yet eighteen years old at the time of the murders and other mitigating factors. It then appropriately weighed these factors against the senselessness of the murders and number of young people killed. In concluding it should not ignore the fact that defendant was responsible for the murder of more than one person, the trial court exercised its discretion to punish defendant for both murders. As it observed, "there is no buy one, get one" for murders. The trial court's imposition of a separate consecutive sentence for the second murder is not unconstitutional under either the federal or state constitutions. The trial court's decision should be upheld. I respectfully dissent.

¶ 90 This case stems from the premeditated murders of Eric Carpenter and his pregnant girlfriend, Kelsey Helton. According to defendant, prior to the murders, defendant and his acquaintance Joshua Ballard had multiple conversations about robbing Carpenter, who was a known

drug dealer. At one point, Ballard stated that they would have to kill Carpenter to avoid being identified after the robbery. Defendant offered to provide a handgun he had stolen to complete the killing. Additionally, defendant informed one of his friends, Liz Perry, about the plan to rob and murder Carpenter.

¶ 91 Ballard and Carpenter established the date and time of the "sale," determining they would meet behind a furniture store on 7 August 2001. That evening, defendant drove Ballard and another friend, Jerome Branch, to the furniture store parking lot. Once they arrived, they met Carpenter but also saw a marked police vehicle in the parking lot. They decided to move the deal to Carpenter's apartment, where his pregnant girlfriend, Helton, also resided.

¶ 92 After arriving at the apartment complex, everyone went inside Carpenter's apartment. Helton left the apartment but came back in, and the conversation turned to her pregnancy. While the evidence on what transpired next is conflicting,[1] defendant says that Ballard ordered Carpenter and Helton to kneel in the kitchen facing the wall and Carpenter and Helton were both shot and killed while the drugs were collected. Thereafter, defendant and Ballard met in the parking lot to split the stolen drugs. Later, they met with friends, including Perry, where they drank alcohol and smoked marijuana laced with cocaine. At some point, defendant told Perry about the robbery and murders.

¶ 93 A few days later, defendant was arrested in connection with the events. Defendant was charged with two counts of first-degree murder, two counts of robbery with a dangerous weapon, and one count of conspiracy to commit robbery with a dangerous weapon. Defendant pled guilty to all charges. He was sentenced to, inter alia, two consecutive terms of life without parole for the murder offenses.

¶ 94 After the Supreme Court of the United States decided *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455 (2012), defendant filed a Motion for Appropriate Relief (MAR), arguing that the Supreme Court's decision in *Miller* rendered his sentence of life without parole unconstitutional since he was a juvenile at the time the crimes were committed.[2]

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1. "[Ballard] testified that he went to Carpenter's apartment only for a drug deal, and that [defendant's] robbery and murder of the victims was unexpected. He stated that he did not even know [defendant] had a gun with him that night." *State v. Ballard*, 180 N.C. App. 637, 640, 638 S.E.2d 474, 477 (2006).

2. At the time of the offense, defendant was approximately seventeen years and four months old.

¶ 95 The resentencing hearing occurred when defendant was thirty-four years old and had been incarcerated for around seventeen years. At resentencing, the State offered evidence, including victim impact testimony, showing the impact of the murders on Helton and Carpenter's families. Defendant offered evidence showing the efforts he had taken in prison to reform his conduct. After considering the evidence, the trial court recounted the devastation to the victims' families as well as the improvement defendant had made while incarcerated. The trial court issued findings on the circumstances surrounding the murders as well as the mitigating factors, which included defendant's age and time in prison. Having the ability to learn of defendant's improvements while incarcerated, the trial court concluded that "defendant is neither in [sic] incorrigible nor irredeemable." As for sentencing, the trial court stated that "there are not bogos [for murder]. There is no buy one, get one. There is no kill one, get one. There is not combination of sentences. There is no consolidation of sentences." The trial court sentenced defendant to two consecutive sentences of life with the possibility of parole, one for the murder of Carpenter followed by one for the murder of Helton. According to this sentence, defendant must spend at least fifty years in prison. *See* N.C.G.S. § 15A-1340.19A (2021) (providing that life imprisonment with parole means that a defendant must serve at least twenty-five years incarcerated for an offense before becoming eligible for parole).

¶ 96 Defendant appealed to the Court of Appeals, arguing (1) that his "consecutive life with parole sentences are excessive and violate the Eighth Amendment," and (2) that his "consecutive life with parole sentences are excessive and violate Article I, Section 27 of the North Carolina Constitution." The Court of Appeals generally agreed, holding that "under Eighth Amendment jurisprudence: (1) *de facto* [life without parole] sentences imposed on juveniles may run afoul of the Eighth Amendment; (2) such punishments may arise out of aggregated sentences; and (3) a sentence that provides for no opportunity for release for 50 or more years is cognizable as a *de facto* [life without parole] sentence." *State v. Kelliher*, 273 N.C. App. 616, 644, 849 S.E.2d 333, 352 (2020). Because the Court of Appeals recognized that this Court has precedents analyzing the cruel and unusual punishment clauses the same under the state and federal constitutions, the Court of Appeals stated that its "analysis . . . applies equally to both" constitutional claims. *Id.* at 633 n.10, 849 S.E.2d at 344 n.10.

¶ 97 The State filed a notice of appeal based upon a constitutional question and, in the alternative, filed a petition for discretionary review with

this Court for review of the Court of Appeals' opinion. Defendant filed a conditional petition for discretionary review. This Court dismissed ex mero motu the State's notice of appeal but allowed both petitions for discretionary review to determine whether the Court of Appeals erred in concluding that defendant's sentence violated both the United States Constitution and the North Carolina Constitution.

¶ 98 On appeal, this Court "review[s] constitutional issues *de novo*." *State v. Whittington*, 367 N.C. 186, 190, 753 S.E.2d 320, 323 (2014). Additionally, where a trial court imposes a sentence within the applicable statutory limit, the trial court's imposition of the sentence is reviewed for abuse of discretion. *State v. Melton*, 307 N.C. 370, 380–81, 298 S.E.2d 673, 680–81 (1983).

¶ 99 All political power resides in the people, N.C. Const. art. I, § 2, and the people act through the General Assembly, *State ex rel. Ewart v. Jones*, 116 N.C. 570, 570, 21 S.E. 787, 787 (1895) ("[T]he sovereign power resides with the people and is exercised by their representatives in the General Assembly."). Unlike the Federal Constitution, "a State Constitution is in no matter a grant of power. All power which is not limited by the Constitution inheres in the people, and an act of a State legislature is legal when the Constitution contains no prohibition against it." *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961) (quoting *Lassiter v. Northampton Cnty. Bd. of Elections*, 248 N.C. 102, 112, 102 S.E.2d 853, 861 (1958), *aff'd*, 360 U.S. 45, 79 S. Ct. 985 (1959)); *see also Jones*, 116 N.C. at 570–71, 21 S.E. at 787 ("The only limitation upon this power is found in the organic law, as declared by the delegates of the people in convention assembled from time to time."). The presumptive constitutional power of the General Assembly to act is consistent with the principle that a restriction on the General Assembly is in fact a restriction on the people. *Baker v. Martin*, 330 N.C. 331, 336, 410 S.E.2d 887, 890 (1991) ("[G]reat deference will be paid to acts of the legislature—the agent of the people for enacting laws." (quoting *State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989))). Thus, this Court presumes that legislation is constitutional, and a constitutional limitation upon the General Assembly must be express and demonstrated beyond a reasonable doubt. *E.g.*, *Hart v. State*, 368 N.C. 122, 126, 774 S.E.2d 281, 284 (2015).

¶ 100 Further, "[t]here should be no doubt that the principle of separation of powers is a cornerstone of our state and federal governments." *State ex rel. Wallace v. Bone*, 304 N.C. 591, 601, 286 S.E.2d 79, 84 (1982). Understanding the prescribed powers of each branch, as divided between the branches historically and by the text itself, is the

basis for stability, accountability, and cooperation within state government. *See State v. Emery*, 224 N.C. 581, 584, 31 S.E.2d 858, 861 (1944) ("[Constitutions] should receive a consistent and uniform construction . . . even though circumstances may have so changed as to render a different construction desirable."). Because that stability "instills public confidence in governmental actions," and because "[a] violation of separation of powers occurs when one branch of government exercises the power reserved for another branch of government," this Court must exercise judicial restraint and refrain from usurping the General Assembly's policymaking role. *State ex rel. McCrory v. Berger*, 368 N.C. 633, 651, 660, 781 S.E.2d 248, 260, 265 (2016) (Newby, J., concurring in part and dissenting in part).

¶ 101 The North Carolina General Statutes address the sentencing requirements for juvenile offenders who commit first-degree murder. These statutes were passed to comply with the Eighth Amendment juvenile cases of the Supreme Court of the United States. This Court has recently upheld this statutory scheme. *See State v. James*, 371 N.C. 77, 99, 813 S.E.2d 195, 211 (2018). Specifically, the following statutes are relevant. N.C.G.S. § 15A-1340.19A provides that

> a defendant who is convicted of first degree murder, and who was under the age of 18 at the time of the offense, shall be sentenced in accordance with this Part. For the purposes of this Part, "life imprisonment with parole" shall mean that the defendant shall serve a minimum of 25 years imprisonment prior to becoming eligible for parole.

N.C.G.S. § 15A-1340.19A. Further, N.C.G.S. § 15A-1340.19B provides, in relevant part, as follows:

> (a) In determining a sentence under this Part, the court shall do one of the following:
>
> (1) If the sole basis for conviction of a count or each count of first degree murder was the felony murder rule, then the court shall sentence the defendant to life imprisonment with parole.
>
> (2) If the court does not sentence the defendant pursuant to subdivision (1) of this subsection, then the court shall conduct a hearing to determine whether

> the defendant should be sentenced to life imprisonment without parole, as set forth in [N.C.]G.S. [§] 14-17 [(2021)], or a lesser sentence of life imprisonment with parole.
>
> . . . .
>
> (c) The defendant or the defendant's counsel may submit mitigating circumstances to the court, including, but not limited to, the following factors:
>
> (1) Age at the time of the offense.
>
> (2) Immaturity.
>
> (3) Ability to appreciate the risks and consequences of the conduct.
>
> (4) Intellectual capacity.
>
> (5) Prior record.
>
> (6) Mental health.
>
> (7) Familial or peer pressure exerted upon the defendant.
>
> (8) Likelihood that the defendant would benefit from rehabilitation in confinement.
>
> (9) Any other mitigating factor or circumstance.

N.C.G.S. § 15A-1340.19B (2021). Moreover, N.C.G.S. § 15A-1340.19C(a) provides that a trial court

> shall consider any mitigating factors in determining whether, based upon all the circumstances of the offense and the particular circumstances of the defendant, the defendant should be sentenced to life imprisonment with parole instead of life imprisonment without parole. The order adjudging the sentence shall include findings on the absence or presence of any mitigating factors and such other findings as the court deems appropriate to include in the order.

N.C.G.S. § 15A-1340.19C(a) (2021). Further, N.C.G.S. § 15A-1354(a) provides that "[w]hen multiple sentences of imprisonment are imposed on a person at the same time, . . . the sentences may run either concurrently or consecutively, as determined by the court." N.C.G.S. § 15A-1354(a) (2021).[3]

¶ 102 Thus, under our statutory scheme, the trial court considers all of the facts and circumstances of a juvenile's case, including the juvenile's age, and exercises its discretion to determine if the juvenile's crime should be punished by life without parole or life with parole. *See James*, 371 N.C. at 99, 813 S.E.2d at 211 (upholding our statutory scheme). Simply put, the trial court has the discretion to sentence an offender convicted of multiple offenses and can choose to impose those sentences consecutively or concurrently. As such, N.C.G.S §§ 15A-1340.19A, -1340.19B, -1340.19C, and -1354 combine to provide the trial court with the authority to impose sentences of life imprisonment either with or without parole on juveniles who commit multiple first-degree murders as well as the discretion to run those sentences concurrently or consecutively. The trial court's discretionary decision will depend on the facts of each case and should be influenced by the number of murders that a defendant committed. *See* N.C.G.S §§ 15A-1340.19B, -1340.19C; *see also James*, 371 N.C. at 99, 813 S.E.2d at 211.

¶ 103 Defendant appears to characterize his complaint as a "facial challenge" to portions of the relevant statutory sentencing scheme. When raising a constitutional challenge, the party raising the challenge can bring a facial or as applied challenge to the allegedly unconstitutional act. Understanding the difference between these two challenges is critically important.

> [A]n as-applied challenge represents a [party's] protest against how a statute was applied in the particular context in which plaintiff acted or proposed to act, while a facial challenge represents a [party's] contention that a statute is incapable of constitutional application in any context. This distinction impacts the inquiry a court must make to determine the validity of a challenged statute, because only in as-applied challenges are facts surrounding the [party's] particular circumstances relevant. Furthermore,

3. Contrary to the majority's assertion, this statutory scheme demonstrates that the General Assembly has not been silent on how to sentence multiple counts of premeditated murder committed by a juvenile defendant. The General Assembly simply has not enacted the majority's preferred scheme.

> if successful in an as-applied claim the [party] may enjoin enforcement of the statute only against himself or herself in the objectionable manner, while a successfully mounted facial attack voids the statute in its entirety and in all applications.

Frye v. City of Kannapolis, 109 F. Supp. 2d 436, 439 (M.D.N.C. 1999) (citations omitted). Additionally, facial challenges are the most difficult on which to prevail given the heavy burden on the challenger to show that there are no circumstances under which a statute would be constitutional or valid. *State v. Grady*, 372 N.C. 509, 564, 831 S.E.2d 542, 581 (2019) (Newby, J., dissenting).

¶ 104 The majority notes that "[defendant] did not raise an as-applied claim asserting that his sentence was constitutionally disproportionate based on the particular circumstances of his case" but rather raises only a "facial" challenge. Clearly, however, the challenge is "as applied" to his sentence under the unique circumstances of defendant's case. There is no statute which defendant challenges facially. For example, the statute which authorizes the trial court to exercise discretion as to whether to impose a consecutive or concurrent sentence is not specifically a statute addressed to juvenile sentences. Thus, defendant actually challenges the use of consecutive sentencing for a juvenile who commits more than one murder if the trial court expressly finds that juvenile not to be "incorrigible or irredeemable." As such, this is an as-applied challenge.[4]

¶ 105 Defendant first argues the trial court's imposition of two consecutive life with parole sentences violates the Eighth Amendment to the United States Constitution. The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. Recently, the Supreme Court of the United States has used this provision to address the sentencing of juveniles. *See Jones v. Mississippi*, 141 S. Ct. 1307, 1318–19 (2021); *Montgomery v. Louisiana*, 577 U.S. 190, 212–13, 136 S. Ct. 718, 736 (2016); *Miller*, 567 U.S. at 479, 132 S. Ct. at 2469; *Graham v. Florida*, 560 U.S. 48, 82, 130 S. Ct. 2011, 2034 (2010); *Roper v. Simmons*, 543 U.S. 551, 578, 125 S. Ct. 1183, 1200 (2005); *see also James*, 371 N.C. at 99, 813 S.E.2d at 211 (upholding the legislature's statutory response to the precedents of the Supreme Court regarding a juvenile defendant who was sentenced to life without parole for first-degree murder). According

4. In *State v. Conner*, an analogous case challenging similar sentencing provisions, the defendant clearly asserts an as-applied challenge. *See State v. Conner*, 2022-NCSC-79, ¶ 19.

to the Supreme Court, the imposition of a life without parole sentence upon a juvenile defendant who has been convicted of premeditated murder complies with the Eighth Amendment so long as the trial court has the discretion to consider the defendant's youth as a sentencing factor.

¶ 106 In *Roper v. Simmons*, the Supreme Court considered the constitutionality of imposing the death penalty on a juvenile offender. *Roper*, 543 U.S. at 555, 125 S. Ct. at 1187. In that case, the defendant, who was seventeen years old when he committed the murder, was convicted of first-degree murder and sentenced to death. *Id.* at 556–58, 125 S. Ct. at 1188–89. Considering the sentence in light of the Eighth and Fourteenth Amendments to the United States Constitution, the Supreme Court recounted the differences between juveniles and adults. *Id.* at 569, 125 S. Ct. at 1195. The Court noted that juveniles are less mature, more vulnerable or susceptible to peer pressure, and have "character [that is] not as well formed as that of an adult." *Id.* at 569–70, 125 S. Ct. at 1195. Because juveniles have a "diminished culpability" as compared to adults, the Supreme Court concluded that any penological justifications for imposing the death penalty would "apply to [juveniles] with lesser force than to adults." *Id.* at 571, 125 S. Ct. at 1196. Thus, the Supreme Court held that "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of eighteen when their crimes were committed." *Id.* at 578, 125 S. Ct. at 1200.

¶ 107 Thereafter, in *Graham v. Florida*, the Court considered "whether the Constitution permits a juvenile offender to be sentenced to life in prison without parole for a nonhomicide crime." *Graham*, 560 U.S. at 52–53, 130 S. Ct. at 2017–18. The Court noted that analyzing challenges under the Eighth Amendment required the Court to evaluate whether the sentence was "disproportionate to the crime." *Id.* at 59, 130 S. Ct. at 2021. The Court emphasized the difference between homicide offenses and all other offenses, with nonhomicide being the category at issue. *Id.* at 69, 130 S. Ct. at 2027. Thus, the Court distinguished between juveniles depending on the type of crime committed. The Court did not look solely at the defendant's age but acknowledged that the nature and severity of the crime impacted its analysis. In specifically looking at juveniles who committed nonhomicide offenses, the Court determined that "penological theory is not adequate to justify life without parole for juvenile nonhomicide offenders." *Id.* at 74, 130 S. Ct. at 2030. The Court stated that a juvenile nonhomicide offender must be given "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75, 130 S. Ct. at 2030. As such, the Court held that "[t]he Constitution prohibits the imposition of a life without parole sentence

on a juvenile offender who did not commit homicide." *Id.* at 82, 130 S. Ct. at 2034. Notably, "*Graham* did not prohibit life without parole for offenders who were under 18 and committed homicide." *Jones*, 141 S. Ct. at 1314 (emphasis omitted).

¶ 108 Later the Court revisited juvenile sentencing, this time in the context of statutorily mandated life without parole sentences for juveniles who committed homicide offenses. *Miller v. Alabama* involved two defendants, both of whom were fourteen years old at the time of the offenses and had been sentenced to life without parole under mandatory sentencing schemes for homicide offenses. *Miller*, 567 U.S. at 465–69, 132 S. Ct. at 2461–63. The Supreme Court recounted *Roper* and *Graham* as cases that "establish[ed] that children are constitutionally different from adults for purposes of sentencing." *Id.* at 471, 132 S. Ct. at 2464. The Court noted that any mandatory sentencing schemes applying to juvenile offenders, including the schemes at issue here, "remov[ed] youth from the balance" and "prohibit[ed] a sentencing authority from assessing whether the law's [now] harshest term of imprisonment proportionally punishes a juvenile offender." *Id.* at 474, 132 S. Ct. at 2466. The Court expressed that trial courts should have discretion to consider a juvenile's chronological age, maturity, appreciation of risks and consequences, home environment, and susceptibility to peer pressure. *Id.* at 477–78, 132 S. Ct. at 2468. It held "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Id.* at 479, 132 S. Ct. at 2469. The Court expressly declined to consider the argument of whether the Eighth Amendment "requires a categorical bar on life without parole for juveniles." *Id.* at 479, 132 S. Ct. at 2469. Instead, the Court's conclusion required that trial courts have discretionary sentencing authority so they may examine a juvenile's age when determining his sentence.

¶ 109 Thereafter, the Court again considered a juvenile sentencing case to decide the narrow issue of "whether [the holding in *Miller*] is retroactive to juvenile offenders whose convictions and sentences were final when *Miller* was decided." *Montgomery*, 577 U.S. at 194, 136 S. Ct. at 725. The Court reiterated the principle from *Roper*, *Graham*, and *Miller* that the age that an offender commits a crime, i.e., his or her status as a juvenile at the time of the offense, is a sentencing factor to be considered by the sentencing court. *Id.* at 213, 136 S. Ct. at 736. The Court concluded that because *Miller* had announced a substantive rule about juvenile sentencing for homicide offenses, "*Miller*'s prohibition on mandatory life without parole for juvenile offenders . . . must be retroactive." *Id.* at 206, 136 S. Ct. at 732.

¶ 110 Most recently, the Supreme Court revisited juvenile sentencing in *Jones v. Mississippi*. There the defendant, a fifteen-year-old, murdered his grandfather and attempted to cover up his own role in the crime. *Jones*, 141 S. Ct at 1312. The defendant was originally sentenced to mandatory life without parole, but in the wake of *Miller*, the Mississippi Supreme Court concluded that *Miller* applied retroactively to the defendant's sentence and remanded the case for resentencing. *Id*. At the end of the resentencing hearing, the trial court acknowledged it had discretion to impose a sentence of less than life without parole but chose not to do so given the relevant factors at issue concerning the defendant's culpability. *Id.* at 1313.

¶ 111 When the case came before the Supreme Court of the United States, the defendant argued that *Miller* mandated that a trial judge must either "(i) make a separate factual finding of incorrigibility, or (ii) at least provide an on-the-record sentencing explanation with an 'implicit finding' of permanent incorrigibility" in order to sentence a juvenile defendant to life without parole *Id*. The Supreme Court plainly rejected the defendant's challenge and held that a sentencing judge is not required to determine whether a juvenile defendant is incorrigible before sentencing that defendant to life without parole. *Id.* at 1318–19.

¶ 112 In doing so, the Supreme Court reviewed its recent cases involving the Eighth Amendment, stating that "*Miller* cited *Roper* and *Graham* for a simple proposition: Youth matters in sentencing. And because youth matters, *Miller* held that a sentencer must have discretion to consider youth before imposing a life-without-parole sentence." *Id.* at 1316. More specifically, the Court noted that "*Miller* repeatedly described youth as a *sentencing factor* akin to a *mitigating circumstance*." *Id.* at 1315 (emphases added). The Court emphasized that this requirement in *Miller*—that there must be a discretionary sentencing procedure for imposing life without parole on a juvenile—did not extend beyond that, meaning *Miller* did not require a court to make a finding of permanent incorrigibility before imposing a sentence of life without parole. *Id*. at 1317–18. The Court elaborated that "[t]he key assumption of both *Miller* and *Montgomery* was that discretionary sentencing allows the sentencer to consider the defendant's youth, and thereby helps ensure that life-without-parole sentences are imposed only in cases where that sentence is appropriate in light of the defendant's age." *Id*. at 1318. *Miller* and *Montgomery* did not, however, require a finding of incorrigibility. *Id*.

¶ 113 The Court stated that the holding in *Jones* did not overrule *Miller* or *Montgomery*. "*Miller* held that a State may not impose a mandatory

life-without-parole sentence on a murderer under 18. Today's decision does not disturb that holding. *Montgomery* later held that *Miller* applies retroactively on collateral review. Today's decision likewise does not disturb that holding." *Id.* at 1321. The Court noted the importance of analyzing *Miller* and *Montgomery* by looking to "their explicit language [to address] the precise question before" the Court. *Id.* at 1322. The Court refused to, however, go beyond the parameters of *Miller* or *Montgomery* to impose a finding akin to what the defendant argued was necessary. Importantly, the Court reiterated that

> [d]etermining the proper sentence in [a homicide] case raises profound questions of morality and social policy. The States, not the federal courts, make those broad moral and policy judgments in the first instance when enacting their sentencing laws. And state sentencing judges and juries then determine the proper sentence in individual cases in light of the facts and circumstances of the offense, and the background of the offender.
>
> Under our precedents, this Court's more limited role is to safeguard the limits imposed by the Cruel and Unusual Punishments Clause of the Eighth Amendment.

Id. Thus, the Court noted that state legislatures set sentencing policies and that trial courts effectuate those policies. *Id.* at 1323. It held that a determination of incorrigibility is not required in order for a trial court to sentence a juvenile defendant who had been convicted of murder to life without parole. *Id.* at 1313.

¶ 114 The cases summarized above reveal the following rule: the imposition of a life without parole sentence upon a juvenile defendant who has been convicted of premeditated murder is constitutionally permissible so long as the relevant statutory scheme provides the trial court with the discretion to consider the defendant's youth as a sentencing factor. As *Jones* made clear, the Supreme Court's decisions in *Graham*, *Roper*, and *Miller* answered limited questions, and at most, stood for the proposition that age is a factor which a trial court should be permitted to consider when sentencing a juvenile defendant. *See id.* at 1316 (*Miller* required " 'only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing' a life without parole sentence." (quoting *Miller*, 567 U.S. at 483, 132 S. Ct. at 2471)). Further, at no point has the Supreme Court suggested that a defendant's age must be the predominant sentencing factor. As such,

a trial court need not determine that a juvenile defendant is incorrigible or irredeemable before using its discretion to sentence the defendant to life imprisonment without the possibility of parole. *See id.* at 1313. Rather, such a sentence is constitutionally permissible so long as the trial court is permitted to consider the juvenile defendant's age and attendant characteristics.

¶ 115 Here in compliance with *Miller*, North Carolina's relevant statutory scheme provides trial courts with the discretion to consider youth as a factor when sentencing juvenile defendants. This sentencing scheme was recently upheld by this Court. *See James*, 371 N.C. at 99, 813 S.E.2d at 211. The trial court in the present case complied with the statutory scheme by using its discretion to consider defendant's youth in addition to several other factors. In exercising its discretion, however, it determined that two consecutive life with parole sentences were appropriate under these circumstances.

¶ 116 The trial court thus exercised the exact type of judgment that *Miller* requires. *See Miller*, 567 U.S. at 465, 132 S. Ct. at 2460. The trial court did not impose a mandatory sentence but rather made an individualized determination in defendant's sentencing by considering defendant's age at the time of the offenses and his ability to be rehabilitated. The trial court balanced those factors by considering the seriousness of the offenses here, i.e., the fact that defendant murdered multiple people. The trial court emphasized "that there are not bogos [for murder]. There is no buy one, get one. There is no kill one, get one. There is not combination of sentences. There is no consolidation of sentences." Thus, though the trial court, which had the benefit of hearing of defendant's progress during his roughly seventeen years of incarceration, determined that defendant could likely be rehabilitated, it chose to impose consecutive sentences to account for the multiple cold-blooded murders for which defendant was responsible.[5] Under Supreme Court precedents, such a discretionary decision is constitutionally permissible.[6]

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5. It must be noted that the task of a trial court during resentencing when a defendant has established a progress record during his period of incarceration is very different than that of a court who is sentencing someone who recently committed the crime as a juvenile and has no record in prison. Should or could a trial court determine a juvenile to be incorrigible, and even if it must, should the trial court tell a juvenile its view at sentencing? While the Supreme Court recognized that as part of the trial court's consideration, it must consider all the factors including its view of redeemability, it could be counterproductive and cruel to say, "Juvenile defendant, I find you incorrigible and irredeemable."

6. The majority believes if a defendant is rehabilitated, then he should be free from incarceration. While rehabilitation is an important factor in granting parole, there are others as well, such as the seriousness of the crime, which impacts what is just punishment and deterrence. The trial court here considered all of the relevant factors.

¶ 117 Moreover, defendant's sentences in the present case also comply with the North Carolina Constitution. Predating the drafting of the Eighth Amendment by thirteen years, North Carolina, like its neighboring original states, derived its prohibition against cruel or unusual punishments from the English Declaration of Rights. *See* John V. Orth and Paul Martin Newby, *The North Carolina State Constitution* 84 (2d ed. 2013) [hereinafter *State Constitution*]. Article I, Section 27 of the North Carolina Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted." N.C. Const. art. I, § 27.

¶ 118 Like other provisions in the Declaration of Rights, this provision is given clarity elsewhere in the constitution. Specifically, Article XI, Section 1 limits criminal punishments to those specifically listed, including "death" and "imprisonment." N.C. Const. art. XI, § 1. "Because expressly listed here, none can possibly be considered 'cruel or unusual' within the prohibition of Article I, Section 27." *State Constitution* 193; *see also id.* ("[W]hatever is greater than has ever been prescribed, or known, or inflicted, must be excessive, cruel, and unusual."); *Leandro v. State*, 346 N.C. 336, 352, 488 S.E.2d 249, 258 (1997) ("[A] constitution cannot violate itself."). Notably, the United States Constitution does not have a listing of acceptable punishments.

¶ 119 Article XI, Section 2, recognizing the needed balance between justice and mercy, limits the use of the death penalty to "murder, arson, burglary, and rape . . . if the General Assembly shall so enact." N.C. Const. art. XI, § 2. The General Assembly, generally in response to Supreme Court decisions, has limited the death penalty to premeditated first-degree murder with aggravating factors.[7]

¶ 120 Thus, the express language of Article XI, Section 2 justifies the limitation on the death penalty by recognizing that justice can be served for lesser crimes by penalties other than the death penalty. While defendants may "reform," the provision says nothing about the length of prison sentences. Under the state constitution within its express constraints, the General Assembly may enact whatever sentencing policy it deems best. Given its history, Article I, Section 27 applies mainly to

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7. Contrary to the majority's argument, Article XI, Section 2 provides no support for its ruling. Likewise, Article I, Section 1 and the provisions regarding education, Article I, Section 15 and Article IX, are not relevant in the analysis of what is "cruel" under Article I, Section 27. Notably, the majority ignores the relevant state constitutional provisions which clearly define what is cruel or unusual punishment. It instead focuses on the conjunctive "or," which is not relevant to a determination of what punishments are prohibited by our state constitution.

judges who were traditionally granted broad discretion in sentencing matters. The General Assembly, on the other hand, needs broad authority to "regulate criminal procedure and to prescribe the punishment of crimes" so it is "free to respond to new social threats and to reflect the changing perceptions of relative degrees of seriousness in criminal offenses." *State Constitution* 84. Therefore, the relevant statutory scheme, which permits trial courts to impose consecutive life with parole sentences for multiple convictions of first-degree murder, complies with our constitution.

¶ 121 Though the constitutional definition of cruel or unusual punishment explicitly provides for greater punishments under our state constitution, this Court, in recognition of the supremacy of the Federal Constitution, has held that claims under the Eighth Amendment and Article I, Section 27 provide the same protection and are analyzed in the same way. *See State v. Green*, 348 N.C. 588, 603, 502 S.E.2d 819, 828 (1998), *cert. denied*, 525 U.S. 1111, 119 S. Ct. 883 (1999).[8] This Court examines claims under the Eighth Amendment as well as under Article I, Section 27 "in light of the general principles enunciated by this Court and the Supreme Court guiding cruel and unusual punishment analysis." *Id.*; *see State v. Peek*, 313 N.C. 266, 275–76, 328 S.E.2d 249, 255 (1985) (reviewing an Eighth Amendment and Article I, Section 27 claim under the same standard and ultimately determining that a defendant's sentence did not violate either constitution); *State v. Fulcher*, 294 N.C. 503, 525, 243 S.E.2d 338, 352 (1978) (concluding a punishment was neither cruel nor unusual under the state and federal constitutions without providing a separate analysis for reaching its determination). Moreover, this Court has expressly declined to adopt a reading of Article I, Section 27 that would provide broader protection than the Eighth Amendment as "research reveals neither subsequent movement toward such a position by either this Court . . . nor any compelling reason to adopt such a position." *Green*, 348 N.C. at 603 n.1, 502 S.E.2d at 828 n.1. While the majority

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8. "[T]he United States Constitution provides a constitutional floor of fundamental rights guaranteed all citizens of the United States, while the state constitutions frequently give citizens of individual states basic rights in addition to those guaranteed by the United States Constitution." *State v. Jackson*, 348 N.C. 644, 648, 503 S.E.2d 101, 103 (1998). Thus, "the only significant issue for this Court when interpreting a provision of our state Constitution paralleling a provision of the United States Constitution will always be whether the state Constitution guarantees additional rights to the citizen above and beyond those guaranteed by the parallel federal provision." *Id.* Though "[i]n construing the North Carolina Constitution, this Court is not bound by the decisions of . . . the United States Supreme Court," this Court gives "the most serious consideration to those decisions." *Id.*, 503 S.E.2d at 104.

disparages our holding in *Green*, this Court recently cited with approval its analytical approach addressing the cruel and/or unusual punishment clauses. *See James*, 371 N.C. at 78, 813 S.E.2d at 198.

¶ 122 In addition to the explicit statements in *Green* confirming that this Court analyzes cruel or unusual punishment claims the same as Eighth Amendment claims, doing so is consistent with the way this Court has analyzed other criminal-law related provisions of the North Carolina Constitution. *See*, *e.g.*, *State v. Jackson*, 348 N.C. 644, 653–54, 503 S.E.2d 101, 107 (1998) (choosing to analyze a confrontation claim under the North Carolina Constitution in the same way as a Confrontation Clause claim under the United States Constitution); *State v. Lawson*, 310 N.C. 632, 646, 314 S.E.2d 493, 502 (1984) (stating that the Court was not inclined to interpret the state and federal constitutions differently in the context of an equal protection challenge to the death penalty statute).

¶ 123 Historically, this Court has consistently deferred to the legislature's criminal policymaking authority and determined that unless a statute for sentencing is plainly unconstitutional, a judge may impose any sentence within the statutorily proscribed limits without violating the cruel or unusual punishments clause. *See*, *e.g.*, *State v. Lovelace*, 271 N.C. 593, 594, 157 S.E.2d 81, 81–82 (1967) (stating that a sentence that does not exceed the maximum sentence prescribed by statute does not constitute cruel or unusual punishment and thus does not violate the North Carolina Constitution); *see also State v. Ysaguire*, 309 N.C. 780, 786, 309 S.E.2d 436, 441 (1983) ("Only in exceedingly unusual non-capital cases will the sentences imposed be so grossly disproportionate as to violate the Eighth Amendment's proscription of cruel and unusual punishment. The imposition of consecutive life sentences, standing alone, does not constitute cruel and unusual punishment."). We have recognized that "it is the role of the legislature and not the courts to decide the proper punishment for individuals convicted of a crime." *Green*, 348 N.C. at 605, 502 S.E.2d at 829.

¶ 124 Here running defendant's sentences consecutively to allow him parole eligibility at sixty-seven years of age does not violate the North Carolina Constitution for the same reasons that it does not violate the Eighth Amendment. Established precedents from this Court as well as the Supreme Court of the United States do not mandate a defendant's release at a certain age but instead require the trial court to consider youth as a factor during sentencing. Because the trial court in the present case considered defendant's age during resentencing and imposed a statutorily authorized sentence, defendant's sentence does not violate the

North Carolina Constitution.[9] Nor does the imposition of defendant's sentence within the statutory range constitute an abuse of discretion.

¶ 125 To enact its desired criminal penal policy despite the binding precedents that would preclude the majority's end result, the majority discards our holding in *Green* by reasoning that its "time has passed." Additionally, the majority ignores provisions of the North Carolina Constitution that specifically define cruel or unusual punishments and cites provisions that have nothing to do with punishment. It uses those provisions in ways that have no basis in history or in the text of the provisions. Under our state constitution, the General Assembly is tasked with determining criminal justice policy. The majority plainly usurps the role of the legislature and acts as a policymaker, weighing various public policy considerations to reach its desired result. It establishes its preferred policy by setting an arbitrary forty-year limit for sentences, effectively mandating one sentence of life with parole regardless of the number or severity of the crimes. As precedents have consistently recognized, state legislatures are the proper bodies to "make those broad moral and policy judgments in the first instance when enacting their sentencing laws." *Jones*, 141 S. Ct. at 1322. Under existing precedents, the Court's "more limited role is to safeguard the limits imposed by" the Eighth Amendment and Article I, Section 27, not to create policy. *Id.* Nonetheless, the majority enacts its policy decision to grant more leniency to convicted murderers, undermining the General Assembly's role of protecting the people of our state.

¶ 126 The majority today places itself in the General Assembly's criminal justice policymaking role and strips trial courts of their discretionary sentencing authority. Despite the Supreme Court's emphasis in *Miller* that trial courts must be afforded the discretion to consider a juvenile offender's age as a sentencing factor, the majority now removes that discretion from the trial courts in this state. Specifically, the majority holds as follows:

> [I]t violates both the Eighth Amendment to the United States Constitution and article I, section 27 of the North Carolina Constitution to sentence a juvenile homicide offender who has been determined to be "neither incorrigible nor irredeemable" to life without parole. Furthermore, we conclude that any

9. Of note, the imposed sentence would allow for defendant's release during a natural lifespan. *See generally* N.C.G.S. § 8-46 (2021) (providing life expectancy ages to be used as evidence).

> sentence or combination of sentences which, considered together, requires a juvenile offender to serve more than forty years in prison before becoming eligible for parole is a de facto sentence of life without parole within the meaning of article I, section 27 of the North Carolina Constitution because it deprives the juvenile of a genuine opportunity to demonstrate he or she has been rehabilitated and to establish a meaningful life outside of prison.

This declaration, however, is not supported by the Supreme Court's Eighth Amendment jurisprudence, the text or history of our state constitution, or any of our prior decisions.

¶ 127 Notably, the majority errs by focusing almost exclusively on the age factor to the exclusion of the other circumstances including the nature and seriousness of the crime. It ignores that the Supreme Court has held that trial courts must conduct individualized sentencing to determine whether a defendant guilty of premeditated murder should receive life imprisonment with or without parole. The majority determines that a finding by the trial court that defendant is "neither incorrigible nor irredeemable" removes all sentencing discretion from the trial court. The mandatory sentence thus becomes a single sentence of life with parole. The majority then determines that life with parole is capped at forty years and any sentencing beyond that constitutes a de facto life sentence. In the case of multiple murders, as here, it rules that the maximum sentence is the same as the sentence for one murder—parole eligible after twenty-five years.[10]

¶ 128 These policy determinations are for the General Assembly to address, not the courts. The legislative branch is designed to weigh the competing penological considerations. Capping the penalty for multiple murders at one sentence of twenty-five years devalues human life. In

10. Not only does the majority create an arbitrary forty-year cap, but it also usurps the role of the trial court by resentencing defendant in the first instance. In doing so, the majority mandates that defendant become eligible for parole after serving only twenty-five years. It refuses to craft a remedy that will enforce the trial court's decision to punish defendant for the second murder. Interestingly, however, this same majority provides a different remedy in *State v. Conner*, an analogous case published on the same day as the present case. *See State v. Conner*, 2022-NCSC-79, ¶ 64. Pursuant to the majority's ruling in *Conner*, the defendant there could serve the newly established forty-year maximum before becoming parole eligible. *See id.* Thus, a juvenile who committed murder and rape could receive a longer sentence than one who committed multiple murders and robberies. This inconsistency illustrates one of the many reasons why this Court should not legislate criminal sentencing policy. Therefore, the majority here should at least remand this case to the trial court to resentence defendant in the first instance.

the words of the trial court, "[t]here is no buy one, get one" for murder. The majority's holding feeds the rising trend of youth violence, particularly the gang approach of assigning violent actions to younger members because of growing leniency in sentencing. *See* Federal Bureau of Investigation, *2011 National Gang Threat Assessment: Emerging Trends* 18 (2012) ("Gangs have traditionally targeted youths because of . . . their likelihood of avoiding harsh criminal sentencing . . . ."); Daniel Pierce, *High Point Police Report Increase in Juvenile Crimes, Guilford County Schools Sees 8th Death to Gun Violence this School Year*, FOX 8 (Mar. 29, 2022), https://myfox8.com/news/north-carolina/high-point/high-point-police-report-increase-in-juvenile-crimes-guilford-county-schools-sees-8th-death-to-gun-violence-this-school-year/.

¶ 129 The majority's reasoning is especially troubling in cases where a defendant commits multiple murders in separate instances that occur days to months apart. Under the majority's reasoning, time served before parole eligibility seems to be capped at the same forty-year limitation no matter how many murders were committed and no matter how much time elapsed between the murders. What will keep an individual from killing any potential witnesses before he is caught since the time to be served for multiple murders is capped as the same for one murder? In the majority's view, multiple murders do not require longer time in prison before parole eligibility. Indeed, the majority's opinion may result in more instances of trial courts exercising discretion to impose life without parole to ensure that defendants who commit multiple murders do not gain parole eligibility in the same amount of time as individuals who commit non-homicide offenses.

¶ 130 Further, the majority ignores the difficulty in determining a defendant's incorrigibility at initial sentencing. The resentencing in this case took place seventeen years after the crime. Defendant had ample time to better himself. While his actions are commendable, as recognized by the trial court, in the trial court's view, the positive actions by defendant did not completely offset the fact that he had murdered multiple young people. If the trial court had been sentencing defendant shortly after the crimes had been committed, the trial court would not have had access to defendant's future accomplishments. In most cases, a seventeen-year history will not be available to a sentencing judge. Moreover, even in the worst of circumstances, is it good policy for a judge to tell a juvenile defendant, "You are irredeemable"? What psychological impact would that statement have? Would not such a statement be cruel?

¶ 131 The majority's decision is not supported by the federal or state constitutions. Thus, the majority attempts to find support for its criminal

justice policy by looking to other states and foreign countries. However, finding other states or countries with policies that the majority prefers, but with constitutions entirely different than our own, does not justify ignoring our state constitution's express provisions, violating separation of powers, and stripping our General Assembly of its policy-making authority. This Court is not the proper place to make criminal justice policy. Rather, our task is to apply the law as it already exists. If the majority properly understood this Court's role, it would conclude that the imposition of consecutive life with parole sentences for two counts of first-degree murder does not violate the Eighth Amendment of the United States Constitution or Article I, Section 27 of the North Carolina Constitution. Instead, the majority disregards our constitution and precedents; it assumes the role of the legislature and misuses this Court's authority by enacting its desired criminal justice policies. I respectfully dissent.

Justices BERGER and BARRINGER join in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
MICHAEL DEVON TRIPP

No. 27A21

Filed 17 June 2022

Search and Seizure—warrantless search of person—lawfulness—search warrant executed at adjacent property

Defendant's motion to suppress drugs seized from his person was properly denied where competent evidence supported the trial court's findings of fact, which in turn supported the court's conclusion that law enforcement officers had reasonable suspicion to detain defendant pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968), even though defendant was adjacent to, and not on, the piece of property that was the subject of a search warrant (which was issued after defendant sold narcotics to a confidential informant at that address the previous day). Law enforcement was aware of defendant's criminal history as a drug dealer known to carry guns, defendant was in sight of the officers executing the search warrant, and there was a reasonable basis for the detaining officer to believe that defendant was armed.

Justice BARRINGER concurring in part and concurring in the result.

Justice EARLS dissenting.

Justices HUDSON and MORGAN join in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 275 N.C. App. 907, 853 S.E.2d 848 (2020), reversing an order entered on 8 June 2018 and vacating in part and remanding a judgment entered on 2 July 2018, both by Judge Charles H. Henry in Superior Court, Craven County. On 10 August 2021, the Supreme Court allowed defendant's petition for discretionary review of additional issues. Heard in the Supreme Court on 15 February 2022.

Joshua H. Stein, *Attorney General*, *by Kristine M. Ricketts*, *Special Deputy Attorney General*, *for the State-appellee-appellant.*

Paul E. Smith, *for defendant-appellant-appellee.*

BERGER, Justice.

¶ 1 Following the trial court's denial of his motion to suppress, defendant pleaded guilty to various drug offenses including trafficking in heroin, possession with intent to sell or deliver fentanyl, and possession with intent to sell or deliver heroin. The Court of Appeals reversed the trial court's denial of defendant's motion to suppress. Based upon a dissent in the Court of Appeals and the allowance of defendant's petition for discretionary review, there are two issues now before this Court: whether the trial court's findings of fact challenged by defendant are supported by competent evidence, and whether the seizure and subsequent search of defendant comports with the Fourth Amendment. For the reasons stated below, we reverse the decision of the Court of Appeals.

I. Factual and Procedural Background

¶ 2 Investigator Jason Buck of the Craven County Sheriff's Office Narcotics Division was alerted to several overdose deaths which were linked to heroin reportedly sold by defendant. In response to the information he obtained, Investigator Buck arranged a controlled buy of heroin between a confidential informant and defendant on April 25, 2017. Audio and video surveillance of the controlled buy confirmed the sale of heroin by defendant to the confidential informant.

¶ 3 Investigator Buck obtained a search warrant for the location where the controlled buy had occurred, 8450 U.S. Highway 17 N., Vanceboro, North Carolina. The warrant authorized a search of the residence, carport, outside storage building, and three vehicles. Although defendant was identified in the search warrant, search of his person was neither requested in the application nor authorized in the warrant.

¶ 4 A law enforcement briefing was held before execution of the search warrant. Attendees were briefed on the search warrant and the controlled buy that had occurred the previous day. Lieutenant John Raynor, who oversees the narcotics unit, attended the briefing to ensure adherence to the following policy during the execution of the search warrant:

> [A]ll persons on scene or in proximity to our scenes that we believe to be a threat are dealt with, which means that we will detain them briefly, pat them down for weapons, make sure they're not a threat to us and then one of the narcotics investigators on scene will make a determination if that person can leave or not.

Lieutenant Raynor explained in his testimony that individuals considered a threat included

> [a]nyone with a prior history with us, with violent history, known to carry guns, any known drug dealers that we have past history with. By nature, generally drug dealers are considered violent and by nature a majority carry guns in one nature or another, so everybody inside of a known narcotics residence or on the scene there we deal with for our safety purposes, then deem whether or not they're suspect at that point to continue further.

¶ 5 Deputy Josh Dowdy was present at the briefing and understood that defendant was the target of the operation and that officers were searching for heroin based on the controlled buy. Deputy Dowdy was familiar with defendant based on prior law enforcement-related encounters, including three incidents in which defendant had brandished or discharged firearms. All three incidents occurred in the same area along U.S. Highway 17 near the residence identified in the search warrant.

¶ 6 Nearly a dozen officers participated in the execution of the search warrant. Upon his arrival at the site, Deputy Dowdy observed defendant and other individuals on a wheelchair ramp on the neighboring property at 8448 U.S. Highway 17, which belonged to defendant's grandfather.

Testimony at the suppression hearing estimated the distance between the two residences to be between fifty and sixty yards.

¶ 7 Deputy Dowdy approached defendant and instructed him to place his hands on the railing of the wheelchair ramp. Defendant was wearing baggy jogging pants which were loose enough to allow Deputy Dowdy to view the contents of defendant's pockets without manipulating his clothing. Deputy Dowdy observed money in defendant's left pocket and a plastic baggie in defendant's right pocket. Deputy Dowdy patted down the exterior of defendant's clothing and felt a large lump in defendant's right pocket. Based on his training and experience, after seeing the baggie and feeling the lump, in addition to the purpose for which law enforcement was at the scene, Deputy Dowdy believed the baggie contained narcotics. Deputy Dowdy removed the baggie from defendant's pocket and placed him in handcuffs. Testing later determined the contents of the baggie to be more than seven grams of a mixture of heroin and fentanyl.

¶ 8 Defendant moved to suppress the evidence recovered by Deputy Dowdy. In its written order denying defendant's motion to suppress, the trial court found the following:

> 1. Investigator Jason Buck, a sworn law enforcement officer with the Craven County Sheriff's Office and a member of the Coastal Narcotics Enforcement Team, utilized a confidential informant which he found to be reliable to make a controlled purchase of heroin from the defendant, Michael Tripp, on April 25, 2017. The informant was equipped with video and audio equipment from which law enforcement could monitor the transaction. The defendant, who was known by law enforcement as a drug dealer in the Vanceboro area by reputation and criminal history, was identified by the informant and later verified by the recordings as the defendant and the seller of a quantity of heroin to the informant. The sale was made from within the defendant's residence . . . in Vanceboro, North Carolina.
>
> 2. As a result of that investigation, Deputy Buck obtained on April 26, 2017 a search warrant for that residence and several motor vehicles associated with that address from Superior Court Judge Benjamin Alford.

3. At approximately 6:00 p.m. on April 26, 2017 eleven officers with the Craven County Sheriff's Office and Coastal Narcotics Enforcement Team executed that search warrant for that residence.

4. Prior to the execution of the search warrant an operation plan meeting was held by the officers conducting the operation. The plan was to clear the residence and detain all who were present. The residence to be searched was on a dirt road contiguous to homes resided in by other members of the defendant's family. The officers utilized four unmarked vehicles to get to that location. The officers had not obtained an arrest warrant for the defendant prior to the operation.

5. Deputy Josh Dowdy, a nine year veteran of the sheriff's office and a trained member of the Coastal Narcotics Enforcement Team, participated in the execution of the search warrant. Dowdy understood that the target of the search was the defendant. He knew the defendant from at least three other inter[actions] with the defendant. In 2011 and 2013 he had been called to the defendant's residence due to domestic disturbances in which the defendant had been brandishing a firearm. In 2012 he had arrested the defendant for an assault on a female. At the time of that arrest, he was at his grandfather's house which is located about 60 yards from the residence being searched pursuant to the April 26, 2017 search warrant.

6. The Craven County Sheriff's Office had a policy described by Lt. John Raynor that required that all people who are "on scene" or "in proximity to our scene" whom they believe to be a threat or had previously dealt with be detained and briefly patted down for weapons to make sure they are not a threat to any of the narcotics officers. The policy provided that anyone who had a prior violent history, [was] known to carry firearms, or sold narcotics were deemed to be threats.

7. When the narcotics officers arrived at [the residence] in Vanceboro, North Carolina, the defendant was outside at his grandfather's house within sixty yards of the residence to be searched and had a direct line of sight to it and the officers on scene.

8. As Deputy Dowdy was getting out of his motor vehicle he observed the defendant to his right near the front porch of the defendant's grandfather's house. Because of his past experiences with the defendant, his previous firearm possessions, and the reasons that brought law enforcement to this residence, Dowdy asked him to put his hands on the railing of a handicap ramp attached to his grandfather's house so he could "pat" him down for weapons. It was the policy and normal procedure of the Sheriff's Office for the safety of the officers and those present to pat down all individuals with whom they made contact while executing a search warrant. The defendant complied.

9. The defendant was wearing baggy jogging pants. While patting him down Dowdy could feel what he thought was money in his left pocket. Because his pants were so "baggy[,]"[ ] Dowdy could see, without manipulating the garment, a plastic baggie in his right pants pocket, and while patting him down he felt a large lump associated with that baggie. His training and experience allowed him to reasonably conclude that the plastic baggie in the defendant's pocket contained narcotics. As a result Dowdy removed the bag and its contents. Dowdy had concluded that the plastic baggie was consistent with how narcotics are carried and packaged. He was also acutely aware of the reasons that they were searching the defendant's residence.

10. The baggie contained a white powdery substance which Dowdy concluded was a controlled substance. The defendant was handcuffed and detained and walked over to his residence. He

> would be later [ ] charged with multiple counts of trafficking in heroin and felonious possession of fentanyl and marijuana. The search of the defendant resulted in the seizure of 7.01 grams of schedule I heroin and the schedule II opiate, fentanyl. The search of [the] residence resulted in the seizure of drug paraphernalia and marijuana.

¶ 9 Based upon these findings of fact, the trial court made the following conclusions of law:

> 1. That there was probable cause on April 26, 2017 for the issuance of the search warrant for 8450 U.S. Highway 17 in Vanceboro, N.C.
>
> 2. Deputy Dowdy was unaware there existed probable cause to arrest the defendant without a warrant for the previous day's felonious sale of heroin to Deputy Jason Buck's confidential informant. N.C. Gen. Stat. §15A-401(b)(2)(a).
>
> 3. Under the circumstances then existing, Deputy Dowdy conducted a limited "frisk" or search for weapons of the defendant which was reasonable and constitutional. *State v. Long*, 37 N.C[.] App. 662, 668-69, 246 S.E.2d 846, 851 (1978).
>
> 4. Dowdy had reasonable suspicion and was justified from the totality of the circumstances and his previous experience with the defendant in believing that the defendant, who was the subject of multiple narcotics sale investigations, was armed and could pose a danger to those law enforcement officers who were conducting the search of the defendant's residence. *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968).
>
> 5. Because the defendant had made a sale of heroin to an undercover informant the previous day and was the occupant of the premises searched, it was likely he was going to be detained while the search was conducted. An officer executing a warrant directing a search of premises not open to the public may detain any person present for such time as is reasonably necessary to execute

the warrant. If the warrant fails to produce the items named the officer may then search any person present at the time of the officer's entry to the extent reasonably necessary to find the property described in the warrant. N.C. Gen. Stat. §15A-256. The defendant, even if the narcotics had not been uncovered by Dowdy, would have faced such a search under that statute or pursuant to his arrest [for the] sale of heroin and for what was found in the residence. The search of the residence did not apparently result in finding any appreciable amount of heroin.[1]

6. The bag containing heroin had been located in the defendant's baggy pants pocket which Deputy Dowdy could see into when he frisked the defendant. At that time Dowdy had legal justification to be at the place and in the position he was when he saw the baggie in plain view. Its discovery was inadvertent as it was discovered during the pat down. The baggie was immediately apparent to Dowdy to be evidence of a container for illegal narcotics and would warrant a man of reasonable caution in believing the defendant was in possession of drugs and was hiding evidence which would incriminate him. The plain view doctrine was applicable in this case and all the elements were present. *State v. Peck*, 305 N.C. 734, 743, 291 S.E. 2d 637, 642 (1982).

7. After Dowdy observed the baggie and had felt the pocket during his pat down for weapons, because of the totality of the circumstances known to him at the time, he had probable cause to seize the baggie and its contents and later place him under arrest.

¶ 10 Following the trial court's denial of defendant's motion to suppress, defendant pleaded guilty to various drug offenses including trafficking in heroin, possession with intent to sell or deliver fentanyl, and possession with intent to sell or deliver heroin. Defendant reserved his right to appeal the trial court's denial of his motion to suppress.

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1. The State did not argue to this Court that N.C.G.S. § 15A-256 applied.

¶ 11 The majority in the Court of Appeals held that the trial court erred in denying defendant's motion to suppress and vacated the convictions. *State v. Tripp*, 275 N.C. App. 907, 924, 853 S.E.2d 848, 860 (2020). The dissent in the Court of Appeals argued that defendant's detention was justified under the United States Supreme Court's holdings in *Michigan v. Summers* and *United States v. Bailey*, and this Court's decision in *State v. Wilson*. *Id.* at 932–35, 853 S.E.2d at 865–66 (Stroud, J., concurring in part and dissenting in part). The State timely appealed to this Court based upon the dissent. In addition, this Court allowed defendant's petition for discretionary review to determine whether the trial court's findings of fact listed in its order denying the motion to suppress were supported by competent evidence.

II. Standard of Review

¶ 12 Appellate review of a trial court's denial of a motion to suppress "is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Findings of fact not challenged on appeal "are deemed to be supported by competent evidence and are binding on appeal." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011). Even when challenged, a trial court's findings of fact "are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (quoting *State v. Brewington*, 352 N.C. 489, 498, 532 S.E.2d 496, 501 (2000)).

¶ 13 "Conclusions of law are reviewed de novo and are subject to full review." *Biber*, 365 N.C. at 168, 712 SE.2d at 878. Moreover, "the trial court's ruling on a motion to suppress is afforded great deference upon appellate review as it has the duty to hear testimony and weigh the evidence." *State v. McClendon*, 130 N.C. App. 368, 377, 502 S.E.2d 902, 908 (1998), *aff'd*, 350 N.C. 630, 517 S.E.2d 128 (1999).

III. Analysis

A. Whether competent evidence supports the trial court's findings of fact

¶ 14 Defendant contends several of the trial court's findings of fact are not supported by competent evidence. Specifically, defendant challenges findings of fact numbers 1, 5, 7, 8, and 9.

1. Finding of fact #1

¶ 15 Defendant asserts that the trial court's characterization of the 8450 residence as "defendant's residence" is not supported by competent evidence. During the hearing on defendant's motion to suppress, Investigator Buck testified that law enforcement had received "several citizen complaints about activity coming out of" the 8450 residence, and that a bad mixture of heroin "was coming from that residence, from Michael Tripp." In addition, the State entered the search warrant application into evidence. The application indicated that law enforcement had received information that defendant resided at the 8450 address, and that the controlled buy between defendant and the confidential informant took place in the 8450 residence. Thus, the trial court's finding that "[t]he sale was made from within the defendant's residence" was supported by competent evidence.

¶ 16 Defendant also contends that there is no competent evidence to support the trial court's finding that Deputy Dowdy was among the officers who knew defendant was "a drug dealer in the Vanceboro area by reputation and criminal history." To the contrary, Lt. Raynor testified that the officers, including Deputy Dowdy, were briefed about the sale to the confidential informant in the pre-search meeting, "and that that was the probable cause for the search warrant." Audio and video surveillance captured defendant selling drugs to the confidential informant. In addition, defendant had a July 2017 conviction for possession with intent to sell and deliver cocaine. By definition, someone who sells drugs illegally is a drug dealer. *See State v. Williams*, 127 N.C. App. 464, 469, 490 S.E.2d 583, 587 (1997) (characterization of a defendant as a "drug dealer" was a "reasonable inference" based on the defendant's convictions for possession of cocaine with intent to sell). Furthermore, the application for the search warrant stated defendant "is a known drug dealer in the Vanceboro area and has a criminal history dating back to 2009." Deputy Dowdy also testified that in two of his previous encounters with defendant, one involved "some narcotics," and another resulted in defendant's arrest for "assaulting a female and simple possession of marijuana." Thus, there is competent evidence in the record to support the trial court's finding that defendant was a drug dealer.

2. Finding of fact #5

¶ 17 Defendant next challenges the trial court's finding of fact that Deputy Dowdy was a "member of the Coastal Narcotics Enforcement Team" (CNET), a multiagency task force developed to coordinate local law enforcement investigations. Deputy Dowdy testified that he was

an investigator with the Craven County Sheriff's Office and the record shows he participated in the pre-execution briefing with members of CNET. Although Deputy Dowdy did not specifically testify that he was a member of CNET, there is competent evidence in the record to support the trial court's finding.

3. Finding of fact #7

¶ 18 Next, defendant argues that there is insufficient evidence to support the trial court's finding that defendant "had a direct line of sight to the residence to be searched and . . . the officers on scene." Testimony at the suppression hearing described the distance between the 8450 and 8448 residences as "not far at all," and Deputy Dowdy estimated the distance to be around fifty to sixty yards. Investigator Buck testified that he could see people at the 8448 residence from the 8450 residence before entering the residence to conduct the search, and that he observed Deputy Dowdy escorting defendant toward the 8450 residence from the 8448 residence after the search of the residence was completed.

¶ 19 While defendant submitted a photograph that showed certain bushes or trees could have possibly obstructed the line of sight between the residences, this Court affords great deference to a trial court's determination on conflicting evidence when reviewing a motion to suppress. *See State v. Malone*, 373 N.C. 134, 145, 833 S.E.2d 779, 786 (2019) ("A trial court has the benefit of being able to assess the credibility of witnesses, weigh and resolve any conflicts in the evidence, and find the facts, all of which are owed great deference by this Court."). Accordingly, competent evidence in the record establishes that there was a direct line of sight from defendant's location to his residence.

4. Finding of fact #8

¶ 20 Defendant challenges the trial court's finding that Deputy Dowdy detained and searched defendant based on "his past experiences with the defendant, his previous firearm possessions, and the reasons that brought law enforcement to this residence." Defendant contests this finding "to the extent it is inconsistent with Deputy Dowdy's concession that he believed he was acting pursuant to the search warrant."

¶ 21 Deputy Dowdy testified that he initially approached defendant because "he was [the] target of the search warrant." Deputy Dowdy's prior encounters with defendant, which included incidents related to violence, firearms, and illicit drugs, led Deputy Dowdy to conduct the pat-down for weapons for officer safety. In addition, Deputy Dowdy testified that he was aware of the recent controlled buy and that law

enforcement was present at the scene to search for evidence related to transporting and distributing "Cocaine, Marijuana and other controlled dangerous substances."

¶ 22 Thus, there is competent evidence in the record to support the finding that Deputy Dowdy detained and searched defendant "[b]ecause of his past experiences with the defendant, his previous firearm possessions, and the reasons that brought law enforcement to this residence."

5. Finding of fact #9

¶ 23 Defendant challenges the finding that "Deputy Dowdy 'was also acutely aware of the reasons that they were searching the defendant's residence.' " Defendant argues this finding is not supported by the record "to the extent it indicates Deputy Dowdy knew the details underlying the application for the search warrant." Lieutenant Raynor testified that Deputy Dowdy was present at the pre-execution briefing, that those in attendance were informed of the controlled buy, and that a search warrant had been issued. Deputy Dowdy testified that he was present at the pre-execution briefing and had been called "to assist . . . with a search of [defendant's] residence." This evidence supports the finding that Deputy Dowdy was aware of the reasons for which law enforcement was searching the defendant's residence.

¶ 24 Defendant also challenges this finding "[t]o the extent it does imply that [Deputy] Dowdy believed the baggie contained narcotics based solely on his visual observations." Nonetheless, defendant admits in the following sentence that the record "demonstrates it was both the sight of the baggie and how the baggie felt during the frisk that made Deputy Dowdy believe it contained narcotics." Thus, competent evidence supports a finding that after seeing and feeling the baggie, Deputy Dowdy, based on his training and experience, reasonably concluded the baggie contained narcotics.[2]

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2. Additionally, defendant argues that the trial court's conclusion of law that defendant was an occupant of the premises to be searched is a finding of fact not supported by the evidence. "Whether a statement is an ultimate fact or a conclusion of law depends upon whether it is reached by natural reasoning or by an application of fixed rules of law," and the designation of such by a trial court is not determinative. *Brown v. Charlotte Mecklenburg Bd. of Educ.*, 269 N.C. 667, 670, 153 S.E.2d 335, 338 (1967) (cleaned up). Here determination as to whether an individual is an occupant of the premises to be searched is a conclusion of law and is discussed in our analysis of *Summers*, *Winters*, and *Bailey* below.

6. Conclusion

¶ 25 Because the trial court's findings of fact are supported by competent evidence, "they are conclusively binding on appeal." *Cooke*, 306 N.C. at 134, 291 S.E.2d at 619. In addition, the unchallenged findings of fact "are deemed to be supported by competent evidence and are binding on appeal." *Biber*, 365 N.C. at 168, 712 S.E.2d at 878. Thus, we must now determine "whether those factual findings in turn support the judge's ultimate conclusions of law." *Cooke*, 306 N.C. at 134, 291 S.E.2d at 619.

B. *Summers*, *Bailey*, and *Wilson*

¶ 26 The Fourth Amendment declares that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. With respect to the Fourth Amendment, "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Michigan v. Summers*, 452 U.S. 692, 705, 101 S. Ct. 2587, 2595 (1981) (footnotes omitted).

¶ 27 The Supreme Court reinforced this notion in *Bailey v. United States*, stating that "[w]hen law enforcement officers execute a search warrant, safety considerations require that they secure the premises, which may include detaining current occupants." 568 U.S. 186, 195, 133 S. Ct. 1031, 1038 (2013). Officers executing a search warrant are permitted under the Fourth Amendment to "take reasonable action to secure the premises and to ensure their own safety and the efficacy of the search." *United States v. Jennings*, 544 F.3d 815, 818 (7th Cir. 2008) (quoting *Los Angeles County, Cal. v. Rettele*, 550 U.S. 609, 614, 127 S. Ct. 1989, 1992 (2007) (per curiam)). Indeed, "officers have a legitimate interest in minimizing the risk of violence that may erupt when an occupant realizes that a search is underway." *Id.* (citing *Summers*, 452 U.S. at 702–03, 101 S. Ct. at 2594). In addition to officer safety, "facilitating the completion of the search[ ] and preventing flight" are legitimate concerns justifying detention of an occupant. *State v. Wilson*, 371 N.C. 920, 923, 821 S.E.2d 811, 814 (2018) (quoting *Bailey*, 568 U.S. at 194, 133 S. Ct. at 1038).

¶ 28 "An officer's authority to detain incident to a search is categorical; it does not depend on the 'quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure.' " *Muehler v. Mena*, 544 U.S. 93, 98, 125 S. Ct. 1465, 1470 (2005) (quoting *Summers*, 452 U.S. at 705 n.19, 101 S. Ct. at 2594 n.19). Even absent evidence of danger to law enforcement,

> the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence. The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation.

Summers, 452 U.S. at 702–03, 101 S. Ct. at 2594 (footnote omitted).

¶ 29 In interpreting *Summers* and *Bailey*, this Court has opined that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain (1) the occupants, (2) who are within the immediate vicinity of the premises to be searched, and (3) who are present during the execution of a search warrant." *Wilson*, 371 N.C. at, 924, 821 S.E.2d at 815 (cleaned up). These three factors "correspond to the 'who,' 'where,' and 'when' of a lawful suspicionless seizure incident to the execution of a search warrant." *Id.* at 924, 821 S.E.2d at 815.

¶ 30 Only two of the *Wilson* factors are at issue in the present case: whether defendant was an occupant of the 8450 residence as defined by this Court's precedent in *Wilson* and whether defendant was within the immediate vicinity of the area to be searched.

¶ 31 Determining whether an individual is an occupant and whether that individual is within the immediate vicinity necessarily involves many of the same considerations. *See Bailey*, 568 U.S. at 203, 133 S. Ct. at 1043 (Scalia, J., concurring) (Occupants are "persons within the immediate vicinity of the premises to be searched." (cleaned up)); *cited with approval in United States v. Freeman*, 964 F.3d 774, 780–81 (8th Cir. 2020), *cert. denied*, 141 S. Ct. 1252, 208 L. Ed. 2d 636 (2021).

¶ 32 This Court concluded in *Wilson* "that a person is an occupant for the purposes of the *Summers* rule if he 'poses a real threat to the safe and efficient execution of a search warrant.' " 371 N.C. at 925, 821 S.E.2d at 815 (quoting *Bailey*, 568 U.S. at 201, 133 S. Ct. at 1042). Thus, although not an "occupant" in the ordinary sense of the word, an individual's "own actions [can] cause[ ] him to satisfy the first part, the 'who,' of the *Summers* rule." *Id.* at 926, 821 S.E.2d at 816.

¶ 33 The Supreme Court announced the immediate vicinity rule in *Bailey*, stating that "[a] spatial constraint defined by the immediate vicinity of the premises to be searched is . . . required for detentions incident to the execution of a search warrant." 568 U.S. at 201, 133 S. Ct. at 1042. But *Summers* is "not confine[d] . . . to the premises identified in the search warrant, but extends . . . to the immediate vicinity of those premises."

Wilson, 371 N.C. at 925, 821 S.E.2d at 815. Because reasonable minds may disagree on where the immediate vicinity line may be drawn, the Supreme Court noted that:

> In closer cases courts can consider a number of factors to determine whether an occupant was detained within the immediate vicinity of the premises to be searched, including the lawful limits of the premises, whether the occupant was within the line of sight of his dwelling, the ease of reentry from the occupant's location, and other relevant factors.

Bailey, 568 U.S. at 201, 133 S. Ct. at 1042. Thus, the spatial limitation for detention discussed in *Bailey* is not necessarily the boundary of the property to be searched, but rather, may extend beyond the lawful limits of the property. Ultimately, determining whether an occupant was within the vicinity is a question of reasonableness. *See id.* at 201, 133 S. Ct. at 1042; *see also Wilson*, 371 N.C. at 925, 821 S.E.2d at 815.

¶ 34 As the trial court found, "[i]t was the policy and normal procedure of the Sheriff's Office for the safety of the officers and those present to pat down all individuals with whom they made contact while executing a search warrant." This practice is consistent with the rationale in *Wilson* that "someone who is sufficiently close to the premises being searched *could* pose just as real a threat to officer safety and to the efficacy of the search as someone who is within the premises." *Wilson*, 371 N.C. at 925, 821 S.E.2d at 815. As noted in *Summers*, "no special danger to the police" is required, 452 U.S. at 702, 101 S. Ct. at 2594; yet here defendant was a known drug dealer with a history of gun violence who was "within sixty yards of the residence to be searched and had a direct line of sight to it and the officers on scene." Defendant was outside a relative's home with other individuals when officers arrived to search his residence. This situation could have escalated quickly absent the encounter by Deputy Dowdy. Based on the totality of the circumstances, defendant was an occupant within the immediate vicinity of the 8450 residence because defendant was close enough to the search that he had access to the residence and could have posed a real threat to CNET officers and the efficacy of the search.

¶ 35 The risk of harm here was minimized by law enforcement's "unquestioned command of the situation." *Id.* at 702–03, 101 S. Ct. at 2594.[3]

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3. We are ever mindful that "court[s] should not indulge in unrealistic second-guessing" of judgment calls made by law enforcement. *United States v. Sharpe*, 470 U.S. 675, 686, 105 S. Ct. 1568, 1575 (1985).

Because law enforcement officers are not required to ignore obvious dangers—here a drug dealer with a history of gun violence—defendant was an occupant within the immediate vicinity of his residence "even though [he] was not within the lawful limits of" his residence. *See Freeman*, 964 F.3d at 781; *see also Wilson*, 371 N.C. at 924, 821 S.E.2d at 815.

¶ 36 "[W]e must determine separately whether the search of defendant's person was justified." *Wilson*, 371 N.C. at 926, 821 S.E.2d at 816. In making such a determination, this Court has stated:

> In *Terry v. Ohio*, the Supreme Court determined that a brief stop and frisk did not violate a defendant's Fourth Amendment rights when a reasonably prudent man would have been warranted in believing the defendant was armed and thus presented a threat to the officer's safety while he was investigating his suspicious behavior. In other words, an officer may constitutionally conduct what has come to be called a *Terry* stop if that officer can reasonably conclude in light of his experience that criminal activity may be afoot. The reasonable suspicion standard is a less demanding standard than probable cause, and a considerably less demanding standard than preponderance of the evidence.

Id. at 926, 821 S.E.2d at 816 (cleaned up).

¶ 37 An officer can subject a detainee to a limited frisk only when he acts upon " 'specific and articulable facts' " that led him to conclude that [the] defendant was, or was about to be, engaged in criminal activity and . . . was 'armed and presently dangerous.' " *State v. Butler*, 331 N.C. 227, 233, 415 S.E.2d 719, 722 (1992) (quoting *Terry v. Ohio*, 392 U.S. 1, 21, 24, 88 S. Ct. 1868, 1880, 1881 (1968)). Ultimately, "[i]n determining whether the *Terry* standard is met," to justify a frisk for weapons, this Court considers the law enforcement officer's actions "in light of the totality of the circumstances." *Id.* at 233, 415 S.E.2d at 722. When analyzing the totality of the circumstances in cases involving known criminals, the Supreme Court has instructed courts to consider all of the "various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers," that a "trained officer [uses to] draw[ ] inferences and make[ ] deductions." *United States v. Cortez*, 449 U.S. 411, 418, 101 S. Ct. 690, 695 (1981). In addition, officers may draw on their own experience and specialized training to make inferences from, and deductions about,

the cumulative information available to them that might well elude an untrained person. *See United States v. Arvizu*, 534 U.S. 266, 276, 122 S. Ct. 744, 752 (2002).

¶ 38 Firearms are tools of the trade for individuals involved in the illegal distribution of drugs. *See State v. Blagg*, 377 N.C. 482, 858 S.E. 2d 268, 2021-NCSC-66, ¶ 26; *see also United States v. Ward*, 171 F.3d 188, 195 (4th Cir. 1999) ("Guns are tools of the drug trade and are commonly recognized articles of narcotics paraphernalia."); *United States v. Kennedy*, 32 F.3d 876, 882 (4th Cir. 1994) ("[T]he law has uniformly recognized that substantial dealers in narcotics possess firearms and that entrance into a situs of drug trafficking activity carries all too real dangers to law enforcement officers." (cleaned up)); *United States v. Caggiano*, 899 F.2d 99, 103 (1st Cir. 1990) ("It is now recognized by us and other circuits that firearms are one of the tools of the trade of drug dealers. Guns, like glassine bags, scales and cutting equipment[,] are an expected and usual accessory of the narcotics trade."), *abrogated on other grounds by Horton v. California*, 496 U.S. 128, 110 S. Ct. 2301 (1990); *United States v. Trullo*, 809 F.2d 108, 113 (1st Cir.1987) ("[T]o substantial dealers in narcotics, firearms are as much tools of the trade as are most common recognized articles of drug paraphernalia." (cleaned up)); *Polk v. State*, 348 Ark. 446, 453, 73 S.W.3d 609, 614 (2002) (recognizing that "firearms are considered a tool of the narcotic's dealer's trade.").

¶ 39 As discussed above, defendant was a known drug dealer with a history of gun violence. This information was known to Deputy Dowdy, who had been briefed on the purpose and justification for issuance of the warrant to search defendant's residence. A magistrate had determined probable cause existed that drugs and firearms were likely to be found in defendant's residence during the execution of the search warrant, and defendant was an occupant within the immediate vicinity of his residence at the time of the search. The trial court determined that Deputy Dowdy conducted the frisk "[b]ecause of his past experiences with the defendant, [defendant's] previous firearm possessions, and the reasons that brought law enforcement to this residence."

¶ 40 In viewing the totality of the circumstances, Deputy Dowdy relied on specific and articulable facts based on his training, experience, and available information to form the reasonable belief that defendant was armed. *See Butler*, 331 N.C. at 233–34, 415 S.E.2d at 722–23. Thus, Deputy Dowdy's limited frisk of defendant was lawful.

¶ 41 During the frisk for weapons, Deputy Dowdy observed a plastic baggie in defendant's pocket. Deputy Dowdy eventually seized the plastic

baggie, which contained a white powdery substance. Subsequent testing revealed the substance was a mixture of heroin and fentanyl.

¶ 42 Our State has adopted the "plain-view" doctrine as an exception to the general prohibition against warrantless seizures:

> While the general rule is that warrantless seizures are unconstitutional, a warrantless seizure of an item may be justified as reasonable under the plain view doctrine, so long as three elements are met: First, "that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed"; second, that the evidence's "incriminating character . . . [was] 'immediately apparent' "; and third, that the officer had "a lawful right of access to the object itself."

State v. Grice, 367 N.C. 753, 756–57, 767 S.E.2d 312, 316 (2015) (quoting *Horton v. California*, 496 U.S. 128, 136–37, 110 S. Ct. 2301, 2308 (1990)).

¶ 43 The Supreme Court later extended warrantless seizures of items to "cases in which an officer discovers contraband through the sense of touch during an otherwise lawful search." *Minnesota v. Dickerson*, 508 U.S. 366, 375, 113 S. Ct. 2130, 2137 (1993). The "plain-feel" doctrine states that

> [i]f a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context.

Id. at 375–76, 113 S. Ct. at 2137.

¶ 44 During the pat-down for weapons, Deputy Dowdy observed a plastic baggie in defendant's pocket and "felt a large lump associated with that baggie." Based on his training and experience and the search of defendant's residence for contraband, the trial court determined that Deputy Dowdy reasonably and immediately concluded that the plastic baggie in defendant's pocket contained narcotics. Thus, seizure of the plastic baggie was permitted, and the search of defendant was constitutional.

IV. Conclusion

¶ 45 For the foregoing reasons, competent evidence supports the trial court's findings of fact, which, in turn, support its conclusions of law that defendant was lawfully detained pursuant to *Summers* and *Wilson*. Furthermore, the frisk of defendant, which led to the discovery of the illegal contraband, was reasonable under the totality of the circumstances. We reverse the decision of the Court of Appeals and reinstate defendant's convictions for trafficking in heroin and possession with intent to sell or deliver fentanyl. Defendant's remaining convictions are not before this court on appeal, and those convictions remain undisturbed. This case is remanded to the Court of Appeals for further remand to the trial court for additional proceedings not inconsistent with this opinion, including correction of any clerical errors identified by the Court of Appeals that are consistent with this opinion.

REVERSED AND REMANDED.

Justice BARRINGER concurring in part and concurring in the result.

¶ 46 As the majority holds, competent evidence supports the trial court's findings of fact which, in turn, support its conclusion of law that Deputy Dowdy lawfully seized the evidence from defendant. However, as the majority acknowledges, Deputy Dowdy had reasonable suspicion under *Terry v. Ohio*, 392 U.S. 1 (1968), to search defendant, rendering the discovery of the evidence lawful. Therefore, I would not reach whether Deputy Dowdy lawfully detained defendant under *Michigan v. Summers*, 452 U.S. 692 (1981), and *Bailey v. United States*, 568 U.S. 186 (2013). Accordingly, I join the majority in full except for its analysis and application of *Summers* and *Bailey*.

Justice EARLS dissenting.

¶ 47 Michael Devon Tripp was standing on his grandfather's porch when a team of Craven County police officers executed a search of the neighboring property. By all accounts, Tripp did nothing to interfere with the search or threaten the officers who were carrying it out; as his arresting officer later testified, Tripp did not "take any action to raise any suspicion of criminal activity on his part." Nonetheless, an officer, who mistakenly believed that the search warrant targeted Tripp personally, detained Tripp, patted him down for weapons, found a bag containing narcotics in his pocket, and then handcuffed him and placed him under arrest. The question before us now is whether the officer's warrantless

detention and search of Tripp violated the Fourth Amendment to the United States Constitution, which "protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures' by the government." *State v. Grady*, 372 N.C. 509, 510 (2019) (quoting U.S. Const. amend. IV).

¶ 48 The majority concludes that the officer's actions did not violate the Fourth Amendment. Admittedly, this is a close case. Tripp was located somewhat near to the property being searched and was believed to have been using that property to distribute narcotics. The officer who detained and searched Tripp had firsthand knowledge that Tripp had brandished and fired a weapon many years ago during an assault that occurred on the same street as the property being searched. Although Tripp was not a target of the search warrant, his suspected criminal conduct was itself the catalyst for the search. Tripp was not an entirely disinterested bystander who just happened upon the scene. Given these individualized circumstances, it is at least plausible that detaining Tripp was an objectively reasonable action undertaken "to secure the premises and to ensure their own safety and the efficacy of the search," *Los Angeles County v. Rettele*, 550 U.S. 609, 614 (2007) (per curiam), or that both the detention and search could independently have been justified under *Terry v. Ohio*, 392 U.S. 1 (1968).

¶ 49 Nonetheless, ultimately I disagree with the majority's interpretation and application of the law governing warrantless detentions incident to searches carried out under authority of a valid warrant. In particular, the majority's articulation of the test required under controlling United States Supreme Court precedent compounds an analytical error this Court committed in *State v. Wilson*, 371 N.C. 920 (2018). Once again, this Court adopts an approach to warrantless detentions incident to searches that is "only tangentially related to the rationales underlying" *Michigan v. Summers*, 452 U.S. 692 (1981) and *Bailey v. United States*, 568 U.S. 186 (2013), and which "suffers from both overbreadth and vagueness." *Wilson*, 371 N.C. at 933 (Beasley, J., concurring in the result only). Functionally, this line of reasoning collapses *Summers* and *Bailey* into *Terry* and, in the process, elides a crucial analytical distinction that safeguards every individual's constitutional right to be free from unreasonable intrusions. Accordingly, I respectfully dissent.

¶ 50 In general, the Fourth Amendment prohibits law enforcement officers from detaining individuals without a warrant or probable cause. *Summers*, 452 U.S. at 700 ("[T]he general rule [is] that every arrest, and every seizure having the essential attributes of a formal arrest, is unreasonable unless it is supported by probable cause."). As with most

rules, there are exceptions. One exception is that officers may stop and frisk an individual when the officer "is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others." *Terry*, 392 U.S. at 24. Another exception is that officers executing a search warrant at a premises are afforded "the limited authority to detain (1) the occupants, (2) who are within the immediate vicinity of the premises to be searched, and (3) who are present during the execution of a search warrant." *Wilson*, 371 N.C. at 924 (cleaned up) (footnotes omitted) (interpreting *Summers* and *Bailey*). These exceptions share a common thread: both were introduced to account for the real and perceived dangers law enforcement officers face when interacting with the public in the course of carrying out official duties. *See*, *e.g.*, *Terry*, 392 U.S. at 23 ("[I]t would be unreasonable to require that police officers take unnecessary risks in the performance of their duties."); *Summers*, 452 U.S. at 702–03 ("[T]he execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence. The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." (footnotes omitted)).

¶ 51 Both of these exceptions might apply at the same time in a given set of circumstances. An officer might possess the authority to detain an individual under *Summers* because the individual is an "occupant" in "the immediate vicinity of the premises being searched" who is "present during the execution of a search warrant," and that officer might simultaneously possess the authority to stop and frisk that individual under *Terry* because the officer has a reasonable suspicion the individual is armed and dangerous. But while these exceptions emerge from the same set of considerations and may apply concurrently, they are analytically distinct. *Summers*, 452 U.S. at 700-01 (noting the Fourth Amendment exception for "momentary, on-the-street detention accompanied by a frisk for weapons involved in *Terry*" before explaining the separate exception applicable to detention incident to a search based upon "the character of the official intrusion and its justification"). An officer's authority to detain an individual based on a reasonable suspicion the individual is armed and dangerous is not spatially or temporally limited. Thus, for *Summers* and *Bailey* to have any substantive meaning, these cases must authorize the detention of an individual who is not reasonably suspected of being armed and dangerous—otherwise, *Summers* and *Bailey* are just another way of characterizing actions that already justify a search under *Terry*.

¶ 52 The most straightforward way to give *Summers* and *Bailey* substance is to give the words the Supreme Court chose to describe the test it was announcing something approaching their ordinary meaning. In *Summers* the Supreme Court held that officers have a limited authority to detain "an *occupant* of premises being searched for contraband pursuant to a valid warrant." 452 U.S. at 702 (emphasis added). An occupant is "[s]omeone who has possessory rights in, or control over, certain property or premises." *Occupant*, Black's Law Dictionary (11th ed. 2019). This defines "who" is subject to a *Summers* detention. In *Bailey* the Supreme Court clarified that this authority only permits officers to detain an "occupant" who is encountered within "the immediate vicinity of the premises to be searched." 568 U.S. at 197. This defines "where" a *Summers* detention may be carried out. Finally, officers may detain an occupant in the immediate vicinity of a property "during the execution of a search warrant." *Id.* at 194. This defines "when" a *Summers* detention may occur. By contrast, under *Terry* the "who" is anyone an officer reasonably suspects to be armed and dangerous, anytime and anywhere that person is encountered.

¶ 53 It may be correct that, as the majority suggests, many individuals who are found within the immediate vicinity of a property while that property is being searched are occupants. If *Summers* and *Bailey* give law enforcement officers a "categorical authority to detain" in order to facilitate the safe execution of a search warrant, *Bailey*, 568 U.S. at 197, then officers cannot be required to make real-time qualitative assessments of an individual's antecedent connection to a property before initiating a detention, *see id.* at 204–05 (Scalia, J., concurring) ("*Summers* embodies a categorical judgment that in one narrow circumstance —the presence of occupants during the execution of a search warrant— seizures are reasonable despite the absence of probable cause.") (emphasis omitted). But *Wilson* maintained the distinction between the "who" and "where" aspects of the *Summers* inquiry, as the Court of Appeals has previously noted. *See State v. Thompson*, 267 N.C. App. 101, 109 (2019) ("The . . . suggestion that a defendant's presence in the immediate vicinity of a searched premises should operate categorically to satisfy the first prong of the *Summers* rule would render entirely superfluous our Supreme Court's scrupulous effort in *Wilson* to define 'occupant' ...."). If *Summers* is a source of categorical authority distinct from *Terry*, then an officer's assessment of the danger posed by an individual is irrelevant. *See Bailey*, 568 U.S. at 204 (Scalia, J., concurring) (explaining that even if there is evidence that a defendant "pose[s] a risk of harm to the officers," that evidence is "irrelevant to whether *Summers* authorized the officers to seize [the defendant] without probable cause")

(cleaned up). The meaning of the term "occupant" must be found somewhere other than in an assessment of the "threat" posed by that individual: occupant means "a resident of the searched premises or a person physically on the premises that are the subject of the search warrant at the time the search is commenced." *Wilson*, 371 N.C. at 934 (Beasley, J., concurring in the result only).

¶ 54 Thus, the majority goes astray in attempting to answer the question of whether Tripp was an "occupant" within the "immediate vicinity" of the premises being searched by asking whether Tripp "pose[d] a real threat to the safe and efficient execution of a search warrant." To be fair to the majority, this Court went astray in the exact same manner in *Wilson* when we stated that "a person is an occupant for the purposes of the *Summers* rule if he 'poses a real threat to the safe and efficient execution of a search warrant.' " *Id.* at 925 (majority opinion) (quoting *Bailey*, 568 U.S. at 201). The problem for the majority today, as for the majority in *Wilson*, is that the quoted language from *Bailey* was explaining why the interests underpinning the *Summers* rule only permitted an "occupant" to be detained within the "immediate vicinity of the premises." *See Bailey*, 568 U.S. at 201 ("Limiting the rule in *Summers* to the area in which an occupant poses a real threat to the safe and efficient execution of a search warrant ensures that the scope of the detention incident to a search is confined to its underlying justification. Once an occupant is beyond the immediate vicinity of the premises to be searched, the search-related law enforcement interests are diminished and the intrusiveness of the detention is more severe."). A person is not an occupant of a property because that individual poses a threat to persons located there as that word is defined either by Supreme Court precedent or by ordinary usage; rather, an occupant may be detained under *Summers* because individuals located at a premises being searched "pose[ ] a real threat to the safe and efficient execution of a search warrant." *Id.*, at 201. Nevertheless, the majority follows *Wilson* in choosing to apply *Summers* in a way that untethers the rule from *Bailey*'s spatial moorings.

¶ 55 The majority appears to recognize the awkwardness of its own attempt to redefine the term "occupant"—as the majority acknowledges, denoting someone to be an "occupant" of a property based upon the threat that person poses to people located on that property is inconsistent with "the ordinary sense of the word." The practical and conceptual problems with this approach were ably summarized in Justice Beasley's concurring opinion in *Wilson*:

Given the Court's stated justifications for *Summers*'s categorical rule, the term "occupant" can most reasonably be interpreted as a resident of the searched premises or a person physically on the premises that are the subject of the search warrant at the time the search is commenced. A nonresident arriving on the scene after the search has commenced has no reason to flee upon the discovery of contraband, to attempt to dispose of evidence, to interfere with the search, or to harm law enforcement officers because, unlike a resident or a person found at the scene when the officers arrive to conduct the search, evidence of wrongdoing discovered on the premises could not reasonably be attributed to him. Furthermore, the presence of a nonresident could do little to facilitate the search—a nonresident would not be able to open locked doors or containers and would have no interest in avoiding "the use of force that is not only damaging to property but may also delay the completion of the [search]," as contemplated by the Court in *Summers*. Moreover, the existence of a valid search warrant—the foundation on which *Summers*'s categorical rule is built—is premised on a judicial officer's determination that police have probable cause to believe that someone in the home is committing a crime. That finding of probable cause does not extend reasonably to a nonresident or a person who is not in the home during the search.

The majority's definition of "occupant" requires no connection whatsoever to the property that is the subject of a search warrant or the suspected criminal activity—only that the person detained "poses a real threat to the safe and efficient execution" of the warrant. It is not unusual for a crowd of curious onlookers to gather along a police perimeter. How an officer executing a search warrant might differentiate a person posing a real threat from a neighbor or an innocent bystander is unclear, as any person in the vicinity of a police search could potentially interfere with the search or harm officers. Moreover, if an officer were able to conclude that a person posed such a threat, invocation of *Summers*'s categorical rule

> would be unnecessary because, as was the case here, the detention and search of that person would be justified by *Terry*.

371 N.C. at 934–35 (Beasley, J., concurring in the result only) (cleaned up) (footnotes omitted). This case perfectly illustrates the analytical confusion Justice Beasley identified. According to the majority, the reason Tripp was an "occupant" of the 8450 residence even though he was located beyond its legal boundaries is because he posed an "obvious danger[ ]" to the officers as "a drug dealer *with a history of gun violence*." But an individual is not an occupant who can be detained in accord with *Summers* because he is within shooting range of a property; an individual that an officer reasonably suspects is armed and dangerous can always be detained under *Terry*.[1]

¶ 56 As described above, the distinction between an officer's authority under *Summers* and that officer's authority under *Terry* might, in certain factual circumstances, not really matter. If the sole consequence of the majority's analysis was that individuals who could be detained under *Terry* can also be detained under *Summers*, nothing much would be lost besides analytical clarity. But conceptually, an interpretation of *Summers* that jettisons its spatial dimension would not necessarily only encompass individuals who could be detained and searched under *Terry* because they were reasonably suspected of being armed and dangerous. Rather, under this interpretation of *Summers*, the category of individuals who "pose[ ] a real threat to the safe and efficient execution of a search warrant," *Bailey*, 568 U.S. at 201, is capacious and susceptible to subjective expansion. Accordingly, the potential group of detainees would continue to include an individual who may use a weapon against officers, certainly, but it could also sweep in "any grass-mowing uncle, tree-trimming cousin, or next-door godson checking his mail, merely based upon his 'connection' to the premises and hapless presence in the immediate vicinity." *Thompson*, 267 N.C. App. at 110. These people

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1. The majority tries to justify this elision by invoking the statement in *Wilson* that a defendant's "own actions . . . [may] cause[ ] him to satisfy the first part, the 'who,' of the *Summers* rule." 371 N.C. at 926 (majority opinion). This observation is true enough, if a person's actions cause that person to be located in the immediate vicinity of a property being searched pursuant to a valid search warrant. Thus, in *Wilson* the majority concluded that the defendant by his own actions became an occupant within the meaning of *Summers* when he "approached the house being swept[and] announced his intent to retrieve his moped from the premises." *Id.* at 925. But if a person's actions cause an officer to reasonably suspect that he or she is armed and dangerous, that person is only searchable pursuant to *Terry*, unless that person is also simultaneously an occupant in the immediate vicinity of the premises being searched.

might not place officers executing a search warrant in physical peril, but their presence could plausibly distract or annoy officers, who might then have grounds to detain them because they are perceived to be interfering with the execution of a search warrant. Interpreted in this manner, *Summers* becomes "a sweeping exception to the Fourth Amendment's proscription against unreasonable seizures" that vests officers with "tremendous" and unbounded discretion. *Id.*

¶ 57 Regardless, under the facts of this case, Tripp's seizure was not justified under *Summers*, even as interpreted by *Wilson*. As the Court of Appeals correctly reasoned, if (1) the "who" and "where" inquiries under *Summers* remain distinct under *Wilson*, and (2) whether someone is an "occupant" of a property depends upon the nature of the threat that individual presents to officers located on the property, then an "occupant" can only be someone who "posed a *real* threat to the safe and efficient execution of the officers' search, not [someone who] *could* have posed a threat." *State v. Tripp*, 275 N.C. App. 907, 918 (2020) (cleaned up). There is absolutely no evidence to support the conclusion that Tripp posed a *real* threat to the officers—indeed, Tripp's arresting officer testified that Tripp did not "take any action to raise any suspicion of criminal activity on his part." The majority appears to suggest that since many courts, although notably not our Court, have labeled firearms one of the "tools of the trade" of drug dealers, therefore for Fourth Amendment purposes, it is fair to assume that any person suspected of dealing drugs is armed, is a threat to police officers, and may be searched at any time in any place. That may be the majority's policy preference, but it is not a correct statement of the law. Instead, "whether a person poses a 'threat' turns on the particular circumstances as well as the particular individual's conduct during the execution of the warrant." *Id.* at 921 (citing *Thompson*, 267 N.C. App. at 110). Tripp did nothing to menace or threaten the officers who were executing the search warrant, nor did he in any way attempt to interfere with their actions. Accordingly, he was not an "occupant" within the meaning of *Summers* as that term was defined in *Wilson*.

¶ 58 For similar reasons, the majority is wrong to conclude that the search of Tripp's person could be justified under *Terry*, which also does not allow law enforcement officers to search any person suspected of dealing drugs at any time based upon the *general* insight that drug dealers sometimes utilize firearms when engaged in illegal activities. *Terry* requires "*specific* and *articulable* facts" that support an officer's conclusion that an individual "was, or was about to be, engaged in criminal activity and . . . was armed and presently dangerous." *State v. Butler*, 331 N.C. 227, 233 (1992) (cleaned up) (emphasis added). Given that

Tripp did not "take any action to raise any suspicion of criminal activity on his part," it is difficult to discern what specific and articulable basis exists for the conclusion that it was reasonable to believe Tripp "was, or was about to be, engaged in criminal activity and . . . was armed and presently dangerous."

¶ 59 Enforcing constitutional limitations on the government's authority to engage in warrantless searches and seizures is not, as the majority suggests, an exercise in "unrealistic second-guessing of judgment calls made by law enforcement." It is instead a necessary function for courts to perform in order to uphold the Fourth Amendment's "recognition of individual freedom," which is "the very essence of constitutional liberty." *Ker v. California*, 374 U.S. 23, 32 (1963) (cleaned up). In fact, the majority's illogical distortion of applicable Fourth Amendment precedent is functionally a nullification of the exclusionary rule. In the majority's view, having found Mr. Tripp in illegal possession of narcotics, the State should be able to punish him. However, in this case the officer's actions in searching him cannot be authorized under the doctrines that give meaning to the Fourth Amendment's prohibition of unreasonable searches and seizures. Therefore, I respectfully dissent.

Justice HUDSON and Justice MORGAN join in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
RILEY DAWSON CONNER

No. 64A21

Filed 17 June 2022

Sentencing—juvenile—murder—rape—consecutive sentences—de facto life without parole

In a case of first impression, where a fifteen-year-old defendant pleaded guilty to the rape and murder of his aunt, his consecutive sentences—240 to 348 months' imprisonment for first-degree rape and life with a possibility of parole for first-degree murder—violated both the federal and state constitutions because, taken together, they would keep defendant incarcerated for forty-five years (at which point, he would be sixty years old) before he could seek parole, and therefore they constituted a de facto sentence of life without parole.

Juvenile offenders who are sentenced to life with the possibility of parole must have the opportunity to seek parole after serving no more than forty years of incarceration.

Justice BERGER dissenting.

Chief Justice NEWBY and Justice BARRINGER join in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from a divided decision of the Court of Appeals, 275 N.C. App. 758 (2020), affirming in part, and vacating and remanding in part, judgments entered on 21 February 2019 by Judge Michael A. Stone in Superior Court, Columbus County. Heard in the Supreme Court on 10 November 2021.

Joshua H. Stein, Attorney General, by Kimberly N. Callahan, Special Deputy Attorney General, for the State.

Glenn Gerding, Appellate Defender, by David W. Andrews, Assistant Appellate Defender, for defendant-appellant.

Disability Rights North Carolina, by Lisa Grafstein, Susan H. Pollitt, and Luke Woollard, for Center for Child and Family Health, National Association of Social Workers, including its North Carolina affiliate, and Disability Rights North Carolina, amici curiae.

Christopher J. Heaney, Emily A. Gibson, and Margaret P. Teich for North Carolina Advocates for Justice, amicus curiae.

MORGAN, Justice.

¶ 1 The Supreme Court of the United States has determined that it is unconstitutional to sentence a juvenile defendant to a term of life without parole without consideration of the juvenile's age and attendant circumstances, and that such a sentence is constitutionally impermissible for the majority of juvenile offenders—specifically those who, upon consideration of their age, the unique circumstances of their respective lives, and the nature of their charged crimes, have been excluded from the narrow category of juveniles who at the time of sentencing can be deemed to be permanently incorrigible or irredeemable. *See Montgomery v. Louisiana*,

577 U.S. 190, 195 (2016) (stating that "a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect 'irreparable corruption.' " (quoting *Miller v. Alabama*, 567 U.S. 460, 479–80 (2012) (quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005)))). In the present case, this Court ponders a potential extension of this cited precedent as we consider whether a fifteen-year-old juvenile defendant's sentences of (1) 240 to 348 months of imprisonment for a conviction of rape and (2) life imprisonment with the possibility of parole for a conviction of murder, ordered by a trial court to run consecutively which will keep defendant incarcerated until the age of sixty years before having the opportunity to demonstrate that he should be allowed to be released on parole, combine to constitute a de facto sentence of life without parole in violation of the Eighth Amendment to the United States Constitution and article I, section 27 of the North Carolina Constitution. This is a question of first impression for this Court, and the Supreme Court of the United States likewise has not yet explicitly addressed this specific circumstance.[1]

¶ 2 A careful review of the pertinent case law, along with the relevant provisions of both the United States Constitution and the North Carolina Constitution, mandates our conclusion that juvenile offenders who have received sentences of life imprisonment with the possibility for parole, while not *guaranteed* parole at any point during their respective terms of incarceration, nonetheless must have the opportunity to seek an early release afforded by the prospect of parole after serving no more than forty years of incarceration.

I. Factual background and procedural history[2]

A. Defendant's childhood

¶ 3 From the time of his birth on 23 August 2000 through the date of 11 March 2016 when, at the age of fifteen years, defendant committed the crimes which led to the convictions underlying this appeal, the juvenile defendant's life was challenging, chaotic, and marked by tremendous instability. At the time that defendant was born, his father was

1. However, "after *Miller*, the Supreme Court in several cases involving aggregate crimes granted certiorari, vacated the sentence, and remanded for consideration in light of *Miller*." *State v. Null*, 836 N.W.2d 41, 73 (Iowa 2013) (collecting cases).

2. The factual background which is provided here is based upon the record before this Court, drawn primarily from the transcripts generated by the entry of defendant's plea and the subsequent sentencing hearing. While the testimony in the record is occasionally inconsistent regarding certain dates and details about defendant's life and experiences, nonetheless efforts have been expended to organize the information in order to create a comprehensible narrative.

twenty years of age,[3] his mother was eighteen years of age, and both parents were addicted to cocaine. Defendant's mother testified at defendant's trial that he began to experience severe sleep disruptions at one or two years of age which she later realized may have been signs of the epilepsy with which defendant was diagnosed as a teenager. Defendant initially lived with his parents on Miller Road in or near Tabor City in Columbus County. When defendant was around five years old, he moved into the home of his maternal grandparents on Savannah Road[4] along with his mother and his younger sister. Defendant's mother testified that during this time, because she was "strung out" on crack cocaine and "running the roads," her parents provided much of the care for her children. Defendant's father was incarcerated during this time period. Numerous members of defendant's extended family lived on Savannah Road and in the neighboring area, including defendant's grandparents, his great-grandmother, and several aunts and uncles. Despite the strong presence of his family members, the area in which defendant was raised was described by defendant's maternal aunt, Kimberly Gore, as "the pits of hell," and by defendant's mother as "nowhere for a child to be" because it was the location of illegal drug use and prostitution.

¶ 4 Gore testified at defendant's trial about defendant's ongoing experience of being passed from home to home as he moved between and among a myriad of family members who served as formal and informal caretakers. In the words of Gore, defendant's "mother and father [were] constantly in and out of his life. They were not by [any] means anywhere close to being stable parents. They rejected [defendant] time and time again." At the age of four years, defendant witnessed the armed arrest of his father and uncle due to the men's possession of a truckload of marijuana, that constituted an event which a mitigation specialist later described as "one of the first really traumatic things that happened in [defendant's] life." According to defendant's mother, defendant eventually saw his father arrested "[m]ultiple times."

¶ 5 When defendant was five years old, both of his parents were arrested for larceny and other charges. Defendant's mother testified that defendant was "picked on" at school because defendant's peers knew that his parents were drug addicts. When defendant was six years old, his father was sentenced to a prison term of five years, and, although

3. At the time of defendant's sentencing hearing, his mother was divorced from his father, had remarried, and was known as Amanda McPaul.

4. The record on appeal includes various references to this thoroughfare as Savannah Road, Savannah Extension Road, and Savannah Road Extension. In this opinion, the roadway will be referred to as Savannah Road for purposes of consistency.

defendant's mother received a sentence of probation, her drug use prevented her from successfully completing her probation and she went to prison when defendant was seven years old. Gore noted that defendant's parents missed most of defendant's early birthday celebrations, and she recalled an incident in which defendant, at the age of seven years, ran "down the side of the highway screaming 'I hate you, I hate you' " as his mother drove away, leaving defendant behind.

¶ 6 At some point around 2005 or 2006, the Columbus County Department of Social Services (DSS) took custody of defendant and his infant sister after defendant reported to Gore that the two children had been taken to a strange structure, which turned out to be a crack house. Defendant's maternal grandparents formally received custody of defendant and his sister when defendant was about six years old. However, the maternal grandmother struggled to care for the children, and defendant frequently stayed with Gore on weekends. Gore testified that, during this time period, defendant experienced severe night terrors during which he would "not wake up." These episodes were accompanied by "outbursts, the flailing of his arms, the slinging, the beating, walking to one end of the house to the other," which was a behavioral pattern that defendant's mother testified had begun when defendant was one or two years old. A doctor who examined defendant when the juvenile was eight years old expressed concern that defendant might be experiencing effects of post-traumatic stress disorder, but defendant did not receive counseling or other treatment.

¶ 7 Also during the time that defendant was eight years of age, his maternal grandmother suffered a stroke. Defendant was then shuttled between the homes of his paternal grandmother and his mother on Savannah Road. Defendant apparently was often removed from the classroom while in elementary school, at times because he was being "picked on" and other times because he reacted violently to being teased in this way. Defendant consistently failed his end-of-grade tests in the third grade and was held back in his school advancement in order to repeat the grade. At the age of nine years, defendant began to use marijuana. At age ten, defendant lived with his mother and stepfather away from Savannah Road for some period of time, but when defendant's father was released from prison during the following year, defendant returned to Savannah Road to live with his father and stepmother. Also residing on Savannah Road at the house belonging to defendant's great-grandmother was defendant's paternal aunt and the paternal aunt's son—consequently, defendant's cousin—Brad Adams, who was about ten to twelve years older than defendant. Adams both used and

sold illegal drugs, sometimes supplying them to defendant. Occasionally, the paternal aunt took defendant to motels in the area while she worked there as a prostitute.

¶ 8 Defendant began drinking alcohol at the age of eleven years old, consuming multiple beers on an almost daily basis and sometimes to the point of unconsciousness. Also when he was eleven years old, defendant began using the controlled substance Xanax, ingesting up to eight pills at a time to get high. Defendant moved to Brunswick County at age twelve and started to become sexually active. Defendant failed his fifth-grade end-of-grade tests and potentially would have been required to repeat the grade, but he transferred to Nakina Middle School, where he was placed in the sixth grade. Defendant went to live with his father for a short period of time and transferred to a different school in another municipality, but following his father's arrest for robbing a bank, defendant returned to live with his mother and stepfather on Savannah Road and transferred back to Nakina Middle School. But the institution would not assign defendant to a classroom because of his confrontations with other students, and defendant was eventually expelled from the school for disruptive behavior and bullying. Defendant then briefly attended an alternative school in Columbus County, followed by another alternative school in South Carolina. While enrolled in the South Carolina school, defendant was charged with the offense of assault for hitting a student in the head with a textbook. As a result, defendant was expelled from the school. When the charge was later dismissed, defendant was readmitted to the school as a sixth grader; however, defendant was soon expelled again from the institution after being adjudicated delinquent in juvenile court for simple possession of marijuana. Defendant's last official education records are from his sixth-grade year.

¶ 9 From this point forward with regard to defendant's education, defendant was supposed to be home schooled by his grandmother, but in actuality, defendant was a "free agent." He spent his days at an abandoned trailer on Savannah Road "to hang out and do drugs" with his older cousin Brad Adams. Family members testified at trial that defendant looked up to and "worship[p]ed" Adams, but they emphasized that the cousin was a very negative role model. Adams illegally sold heroin, methamphetamine, and "pills," all controlled substances, and regularly and illegally provided drugs to defendant. At the age of thirteen years, defendant was diagnosed with frontal lobe epilepsy and received a secondary diagnosis of behavior problems, resulting in prescriptions for Klonopin and other seizure-related medications. Defendant expanded his illegal drug use as well; he began to use opiates at age thirteen and

heroin at age fourteen. The next year, defendant received additional diagnoses of conduct disorder, cannabis use disorder, alcohol use disorder, sedative or hypnotic use disorder, and disruption of family.

¶ 10 In June 2015, when he was fourteen years old, defendant had a disagreement with Adams and Adams's mother, so defendant again left Savannah Road to reside with his mother and stepfather in South Carolina. Defendant subsequently drifted among his father, his father's ex-wife, and his stepsister and her boyfriend in his places of residence. Defendant's seizures increased in frequency at this juncture, numbering as many as six to ten per night, which led to a change in his medications. Around February 2016, defendant briefly moved to Florida to live with his father, and then returned to his mother's home for a short stint, but he ultimately returned to Savannah Road so that he could spend time with Adams and be largely unsupervised. On 22 February 2016, defendant's mother and stepfather took defendant to a doctor because defendant was continuing to withstand up to a dozen seizures on a nightly basis. By 25 February 2016, defendant's nocturnal epilepsy was getting progressively worse, so he went to another doctor who thought the seizures might be due to PTSD. This physician changed defendant's medications yet again.

¶ 11 Five days later, in the early morning hours of 2 March 2016, defendant broke into and entered a local supermarket, stealing a large quantity of cigarettes. The business was equipped with an alarm system which alerted law enforcement to the break-in. At about 4:00 a.m., while officers were at the scene completing a report, one of the officers received word from Adams's mother that defendant had taken a van belonging to her. Security camera footage from the store into which defendant had broken and entered allowed officers to quickly identify defendant as the perpetrator. By the time officers arrived at Savannah Road to locate defendant, he and the van were unable to be found. At about 8:00 a.m., Adams's mother notified law enforcement that defendant had returned her vehicle. Shortly thereafter, officers stopped the van as it was being operated and discovered that Adams's mother was driving the vehicle, with defendant riding in the passenger seat. The officers also recovered the stolen cigarettes from the van.

¶ 12 Upon this development, law enforcement officers prepared a juvenile petition alleging that defendant was delinquent based on (1) breaking or entering, larceny after breaking or entering, and felony possession of stolen property after breaking into a store and stealing cigarettes in connection with the supermarket theft, and (2) larceny of a motor vehicle and possession of a stolen vehicle. The officers made arrangements

for defendant to meet with a juvenile court counselor at 1:00 p.m. on 11 March 2016 and then departed in order to file the petition.

B. Defendant's underlying offenses, statements to law enforcement officers and arrest

¶ 13 Later on the day of 2 March 2016, defendant's aunt Felicia Porter called the emergency number 911 to report that defendant was involved in a scuffle inside the Savannah Road home of defendant's great-grandmother. Porter informed the 911 operator of defendant's juvenile petitions and expressed her belief that defendant "needs to get locked up." The audio recording of the 911 call captures an argument which occurred between defendant and Porter during that time.

¶ 14 According to the transcript of defendant's pleas of guilty which the trial court accepted in the underlying case, on the morning of 11 March 2016—the same date on which defendant had a scheduled 1:00 p.m. appointment with a juvenile court counselor in connection with his pending juvenile petition—defendant's aunt Felicia Porter awakened at about 6:00 a.m. and drove her husband to a nearby location where he was to be provided transportation to a construction job. Porter's social media posts on Facebook show that she was back at her home on Savannah Road and was active online by approximately 9:00 a.m. At about 9:30 a.m., defendant was observed by John Cunningham, his step-grandfather, walking toward the end of the road where Porter's home was located.

¶ 15 Defendant knocked on Porter's door and convinced her to exit the residence. Subsequently, defendant raped Porter and then killed her with blows from a shovel. Defendant placed Porter's body in a wooded area about one hundred yards from her home and then burned a piece of Porter's clothing in her yard. Around 10:30 a.m. to 10:45 a.m., defendant left Porter's residence and walked by the side of the road, stopping to speak to Cunningham along the way. Cunningham noted that defendant was sweating profusely. Defendant attended his scheduled meeting with the juvenile court counselor later that day.

¶ 16 Meanwhile, defendant's great-grandmother, with whom defendant was dwelling at the time, became concerned when Porter did not answer repeated telephone calls. At approximately 12:00 p.m., Cunningham and Adams went to Porter's home to check on her and found the door to the residence ajar, Porter's dog secured inside the house, and Porter absent. After Cunningham contacted Porter's husband, a missing person's report was filed with authorities that afternoon. Porter's badly beaten body was found the next day about one hundred yards from her trailer.

An autopsy revealed that Porter died as a result of blunt force trauma to the head which was later determined to have been caused by being repeatedly struck with a shovel.

¶ 17 Defendant was interviewed by law enforcement officers a total of four times in connection with Porter's death. In his first statement, given on 12 March 2016, defendant denied that he walked toward Porter's residence on the previous day of 11 March 2016, insisting that he had walked in the other direction and reporting that he had seen a suspicious vehicle. After the interview, defendant went to stay with his mother and stepfather. On 16 March 2016, defendant's mother took him to a local hospital emergency room because defendant had begun to have as many as fifteen seizures per night, with some of them being "so severe that he [was] developing bruises along his elbows and shins." On 21 March 2016, defendant experienced his worst seizure ever, losing bowel and bladder control and foaming at the mouth. Defendant was transported to UNC Memorial Hospital where he had up to thirty seizures per night. An MRI of defendant's brain was positive for "mesial temporal sclerosis, which is like damage to the frontal lobe." He was diagnosed with "intractable frontal lobe epilepsy that is poorly controlled." A medical doctor at UNC reported, "This case is complicated by non-compliance of medication, lack of insight of his condition and severe oppositional behavior problem and agitation that often is due to the frequent partial epilepsy." Another doctor also found that the "partial seizures are associated with psychiatric agitation" and that significant behavioral changes "could well be due to uncontrolled frontal seizures." Yet another doctor commented that "frontal lobe epilepsy may affect a patient's ability to regulate his emotions and prevents a patient from getting adequate sleep." While defendant was at UNC Hospital, his mother physically assaulted him, which resulted in a complaint being filed with DSS. By the time that defendant was discharged from UNC Hospital after five days, the number of defendant's seizures had been reduced to seven a night. DSS exercised its placement authority over defendant to house him with his stepsister and her boyfriend upon defendant's release from the hospital.

¶ 18 A few days later, on 29 March 2016, defendant gave three statements to law enforcement officers who were investigating Porter's murder. In his first statement on that date, defendant admitted walking in the direction of Porter's house on 11 March 2016—contrary to defendant's 12 March 2016 statement that he did not walk in the direction of Porter's residence but instead walked in the other direction—but claimed that he did so in order to check on a marijuana plant that defendant was growing in the woods. In a second interview which was requested by defendant himself on the same day of 29 March 2016, defendant represented that

Adams had "been fronted a kilo of heroin" that was in the possession of Porter's husband Herb and that defendant had accompanied Adams to the Porter home in order to confront Herb. Defendant further claimed that when Adams discovered that only Porter was at the residence, Adams struck Porter with a brick, raped her, and then killed her. In his third interview of 29 March 2016, defendant admitted that his previous claim that his uncle "Herb" had been supplied heroin by Adams was false. Defendant still maintained, however, that Adams had raped and killed Porter, but at this stage introduced that he had also raped Porter and had helped Adams to carry Porter's body to the woods where she was discovered.[5] Just after midnight on the early morning of 30 March 2016, defendant was arrested and charged with the rape and murder of his aunt Felicia Porter. Defendant experienced a violent seizure in the detention center and was taken to a hospital where he tested positive for the presence of marijuana and PCP in his system.

C. Defendant's plea, sentencing, and appeal

¶ 19 On 18 February 2019, as part of an agreement with the State, defendant entered pleas of guilty to one charge of first-degree murder with premeditation and deliberation and one charge of first-degree rape in connection with the offenses which he committed as to the victim, his aunt Felicia Porter. In exchange for defendant's pleas, the State dismissed other charges against him, including felony breaking or entering, felony larceny after breaking or entering, two counts of felony possession of stolen goods, and felony larceny of a motor vehicle, all of which charges arose from defendant's theft of a van from Adams's mother and theft of cigarettes from a local supermarket nine days before the rape and murder. Defendant filed a motion seeking to have the trial court to declare that both the imposition of a sentence of life without parole and the sentencing directive found in N.C.G.S. § 15A-1340.19A would be unconstitutional as applied to him. At the conclusion of the State's recitation of the factual basis for defendant's pleas, the trial court denied defendant's motion and moved to the sentencing phase of the proceedings which took place over a period of four days. In addition to documentary evidence and testimony received from defendant's mother, one of defendant's aunts, the husband of defendant's stepsister, and a mitigation specialist—who all testified to the circumstances of defendant's life

5. Forensic analyses of the rape kit conducted on Porter revealed that defendant was the major contributor of DNA and excluded Adams as a perpetrator of rape. No other evidence linked Adams to the rape and murder of Porter. It is unclear from the record on appeal at what point defendant admitted, for the factual basis of his guilty plea, that he alone had raped and killed Porter.

before his arrest for Porter's rape and murder as described above, defendant also offered testimony from a forensic psychologist who described, *inter alia*, defendant's low intelligence quotient score, defendant's acceptance of responsibility for his crimes, and improvements in defendant's behavior during his incarceration. This expert witness also opined that defendant's development and rehabilitation would likely be negatively affected by the imposition of a sentence upon defendant which would deny the juvenile any opportunity for eventual release.

¶ 20 Following the completion of defendant's sentencing hearing on 21 February 2019, the trial court found the existence of nineteen statutory and non-statutory mitigating factors in defendant's case. Specifically, the trial court found that at the time of the offenses:

> • defendant was fifteen years and six months old;
>
> • defendant "exhibited numerous signs of developmental immaturity. . . . exacerbated by low levels of structure, supervision, and discipline";
>
> • defendant's father was incarcerated for most of defendant's life and his mother struggled with substance abuse and incarceration and "has not been present for the vast majority of defendant's life";
>
> • defendant "has been passed to one family member to another for basic living and custodial purposes and never received any parental leadership, guidance, or structure";
>
> • defendant "suffers from chronic frontal lobe epilepsy which went untreated for years causing daily seizures" which then caused "brain injury" and "chronic sleep deprivation";
>
> • defendant was subjected "in his transient living conditions to criminal activity, violence, and rampant substance abuse," with his own substance abuse starting "at approximately age nine";
>
> • defendant's "only role model was a negative role model, Brad Adams, an individual with a horrible criminal history and habitual felon. . . . defendant looked up to Brad Adams, who was ten years senior to [ ] defendant in age";

- defendant "had a limited ability to fully appreciate the risks and consequences of his conduct based upon the totality of his poor upbringing";
- defendant's "I.Q. and educational levels appear at the low range of average to below average";
- defendant "is a record level I for sentencing purposes";
- defendant "was subjected to an overall environment of drugs and other criminal activity";
- defendant, "[b]ased upon testing and other professional evaluations, . . . would benefit from education, counseling, and substance abuse treatment while in confinement and incarceration";
- defendant at age four years "witnessed a drug raid at his home resulting in the arrest of his father and his uncle," after which he "started to experience night terrors";
- defendant at age six years "was removed from his parents' home due to the drug abuse in the home";
- defendant's grandmother reported he "had always been affected by such nightmares and night terrors and that he would awaken three or four times a night with what is now purported to be seizures"; and
- defendant "has recently demonstrated some increased maturity while being incarcerated, and [ ] he did agree to enter this plea [on 18 February 2019]."

¶ 21 The trial court concluded that "the evidence supports the statutory criteria [stated in N.C.G.S. § 15A-1340.19B(c)] and those contained in *Miller vs. Alabama*."[6] (Italics added.) The trial court then sentenced defendant to life imprisonment with the possibility of parole after

6. In *Miller* the Supreme Court of the United States held that the imposition of a mandatory life sentence without the possibility of parole for a juvenile defendant is unconstitutional. 567 U.S. at 479. N.C.G.S. § 15A-1340.19B is part of a statutory framework enacted in response to *Miller* which sets forth procedures for determining whether a juvenile offender "should be sentenced to life imprisonment without parole, as set forth in G.S. 14-17, or a lesser sentence of life imprisonment with parole." N.C.G.S. § 15A-1340.19B(a)(2) (2019).

twenty-five years for the murder.[7] Defendant also received a sentence of 240 to 348 months for first-degree rape, which is the maximum sentence in the presumptive range for the commission of the offense of first-degree rape in light of defendant's prior record level of I pursuant to N.C.G.S. § 15A-1340.17(c) (2019). The trial court ordered that defendant's first-degree murder sentence of life imprisonment with the possibility of parole and sentence for first-degree rape of 240 to 348 months run consecutively, giving an aggregate minimum sentence of forty-five years before defendant could seek parole. Defendant would be sixty years of age at the time that he first became eligible to be considered for parole. The trial court overruled defense counsel's objection in which counsel argued that the imposition of the two consecutive sentences constituted a de facto life without parole sentence in violation of the Constitution of the United States and the Constitution of North Carolina.

¶ 22 Defendant appealed to the North Carolina Court of Appeals, bringing forward three arguments: that (1) N.C.G.S. §§ 15A-1340.19A to -1340.19D (commonly known as North Carolina's "*Miller*-fix statutes"[8]) prohibit the consecutive sentences imposed by the trial court here; (2) the two consecutive sentences imposed on defendant are the functional equivalent of a sentence of life without parole and are therefore unconstitutional under the Eighth Amendment to the United States Constitution and article I, section 27 of the North Carolina Constitution when imposed on a juvenile who is not determined by the trial court to be incorrigible or irredeemable; and (3) the trial court's imposition of lifetime satellite-based monitoring without a hearing was error. *State v. Conner*, 275 N.C. App. 758, 759 (2020). All three judges comprising the appellate court panel agreed that the trial court's order imposing lifetime satellite-based monitoring on defendant must be vacated and remanded "for a hearing on the matter that complies with the statutory procedure in N.C.[G.S.] § 14-208.40A." *Id.* at 760.

¶ 23 In reviewing the consecutive sentences which the trial court ordered defendant to serve, the entire panel also agreed that the *Miller*-fix statutes do not flatly prohibit consecutive sentences, while unanimously recognizing as well that other sentencing provisions which are generally

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7. Under the North Carolina General Statutes, eligibility for parole for defendants convicted of murder who were juveniles at the time of the offense begins after twenty-five years of imprisonment. *Id.* § 15A-1340.19A.

8. The so-called "*Miller*-fix statutes" are laws which were expeditiously enacted by the General Assembly in the wake of the decision issued by the Supreme Court of the United States in *Miller v. Alabama*. These enactments constituted North Carolina's effort to conform this state's juvenile sentencing laws to the mandates of *Miller*.

applicable give trial courts the discretionary authority to decide whether multiple sentences should run concurrently or consecutively. *Id.* at 759 (majority opinion) (citing N.C.G.S. § 15A-1340.19A (2019) (stating that "a defendant who is convicted of first[-]degree murder, and who was under the age of 18 at the time of the offense, shall be sentenced in accordance with this Part") and N.C.G.S. § 15A-1354(a) (2019) (stating that "[w]hen multiple sentences of imprisonment are imposed on a person at the same time . . . the sentences may run either concurrently or consecutively, as determined by the [trial] court")); *id.* at 760 (McGee, C.J., concurring in part and dissenting in part).

¶ 24 In contrast, on the question of whether defendant's consecutive sentences here constitute the functional equivalent of a life sentence without the possibility of parole and are therefore unconstitutional, the Court of Appeals panel divided. The majority correctly observed that "*Miller* has never held as being unconstitutional a life *with* parole sentence imposed on a defendant who commits a murder when he was a minor" and assumed "that a *de facto* [life without parole] sentence (where a defendant is sentenced to consecutive terms for multiple felonies) is unconstitutional," but went on to conclude that

> [d]efendant will be eligible for parole when he is 60 years old. . . . [and held] that based on the evidence before the trial court a 45-year sentence imposed on this 15-year old does not equate to a *de facto* life sentence. Our General Statutes recognize that the life expectancy for a 15-year old is 61.7 years. N.C.[G.S.] § 8-46 (2019).

Id. at 760 (majority opinion). In reaching this result, the majority acknowledged that another panel of the Court of Appeals had "recently held an identical sentence unconstitutional on these grounds in *State v. Kelliher*, [273 N.C. App. 616] (2020)." The majority noted that this Court has stayed the operative effect of, and granted discretionary review in, the *Kelliher* decision. *See* 376 N.C. 900 (2021). The majority thus observed that *Kelliher* is not binding on the panels of the Court of Appeals. *Conner*, 275 N.C. App. at 760.

¶ 25 The author of the Court of Appeals majority decision in *Kelliher* served as the dissenting judge in the lower appellate court's decision in the present case regarding the issue of whether defendant's consecutive sentences constituted an unconstitutional de facto life sentence in violation of the Eighth Amendment to the Constitution of the United States and article I, section 27 of the Constitution of North Carolina, citing,

inter alia, *Kelliher*. *Id*. at 760 (McGee, C.J., dissenting in part). First, the dissent in this case acknowledged the obvious interplay between N.C.G.S. § 15A-1354 and the *Miller*-fix statutes in the sentencing of juvenile offenders, *id*. at 771–73. The dissent then cited our canon of statutory construction that "if 'there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, *the two should be read together and harmonized*.' " *Id*. at 771–72 (quoting *LexisNexis Risk Data Mgmt., Inc. v. N.C. Admin. Off. of the Cts.*, 368 N.C. 180, 186 (2015) (emphasis added)). In undertaking the dictate to harmonize the two relevant statutes, the dissent employed the same starting point as the majority in rejecting defendant's appellate argument that the relevant statutory language "compels sentences with [parole] eligibility at 25 years," *id*. at 771, because "the holding requested by [d]efendant—that the definition of 'life imprisonment with parole' compels sentences allowing for parole eligibility *at* 25 years—would impermissibly deviate from the unambiguous statutory language [of N.C.G.S. § 15A-1354 which permits sentences to be set to run either consecutively or concurrently]," *id*. at 772 (citing *State v. Jackson*, 353 N.C. 495, 501 (2001) ("When the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.") (quoting *In re Banks*, 295 N.C. 236, 239 (1978)).

¶ 26 In applying its statutory analysis and reconciliation of the laws at issue, the dissent would have granted relief to defendant based upon his constitutional argument that the consecutive sentences imposed in his particular case constituted an unconstitutional de facto sentence of life in prison without parole. In addition to reviewing the content and intent of the line of United States Supreme Court cases preceding, including, and following *Miller*, in conjunction with a rejection of the majority's application of "the statutory mortality table found in N.C.[G.S.] § 8-46," *id*. at 780, the dissent would hold that defendant's sentence of "a minimum of 45 years [with an] earliest possible release at age 60 still presents a *de facto* LWOP sentence" in violation of both the Eighth Amendment to the United States Constitution and article I, section 27 of the North Carolina Constitution, *id*. at 775.

¶ 27 With more specific regard to the dissenting view's disagreement with the majority's usage of the statutory mortality table found in N.C.G.S. § 8-46 to sanction the forty-five-year period of incarceration which defendant would be required to complete before having the opportunity to seek parole, the dissent stated that the

> statute by its very terms provides that it "*shall* be received . . . *with other evidence as to the health, constitution and habits of the person*[.]" (emphasis added). Thus, the life expectancy "table . . . is not conclusive, but only evidentiary," *Young v. E. A. Wood & Co.*, 196 N.C. 435, 437 . . . (1929) (construing a predecessor statute), and "life expectancy is determined from evidence of the plaintiff's health, constitution, habits, and the like, *as well as* from [the statutory] mortuary tables." *Wooten v. Warren by Gilmer*, 117 N.C. App. 350, 259 [sic] . . . (emphasis added) (citation omitted). The 61.7 year life expectancy for 15-year-old minors found in the statute certainly [is] not conclusive in light of [d]efendant's "health, constitution, habits, and the like." *Id.* For example—and setting aside any impact that a minimum of 45 years of imprisonment will have on [d]efendant—it is uncontroverted that [d]efendant suffers from mesial temporal sclerosis, epilepsy, PTSD, has a history of head injuries dating back to infancy, and years-long history of heavy, and varied drug abuse dating back to age eleven. The statutory life expectancy and mortality table *requires* consideration of this evidence alongside the tables themselves, N.C.[G.S.] § 8-46, and the majority's reliance on the lone 61.7 number provided by the statute does not change the "reality" of [d]efendant's punishment. *Cf. Graham*, 560 U.S. at 70-71. . . .

Id. at 780. Though offering this perspective, the dissent did not endeavor to propose any specific example or determination of a constitutionally permissible sentence for defendant in this matter.

¶ 28 On 4 February 2021, defendant filed a notice of appeal based upon the dissenting opinion. The standard of review employed by this Court as to constitutional arguments presented here is a de novo standard, without deference to the lower court decisions. *See, e.g.*, *State v. Williams*, 362 N.C. 628, 632–33 (2008).

II. Analysis

A. Precedent and principles regarding sentences for juvenile defendants

¶ 29 Upon defendant's appeal, the question before this Court can be parsed into two subsidiary issues: (1) whether consecutive sentences which

arguably act as a de facto life sentence violate the Eighth Amendment to the United States Constitution and article I, section 27 of the North Carolina Constitution when imposed upon a juvenile defendant when the sentencing court has not determined that the juvenile defendant is incorrigible and irredeemable, and (2) if so, whether the specific sentences as imposed in this case constitute an unconstitutional de facto life without parole sentence for this individual juvenile defendant.

1. The evolution of juvenile sentencing under the Eighth Amendment to the Constitution of the United States

¶ 30 Eighth Amendment jurisprudence regarding sentencing for juvenile defendants has been a fertile ground for change over the past several decades as the Supreme Court of the United States, lower federal courts, and the appellate courts of North Carolina have been consistently beckoned to consider and address the continually evolving societal view of juveniles in the criminal justice system as well as the ongoing discoveries via scientific research regarding the special vulnerabilities and developmental malleability of youthful offenders. The Eighth Amendment to the United States Constitution prohibits the infliction of "cruel and unusual punishments" for any person. U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). Because "cruel and unusual punishments" are not precisely defined in the Eighth Amendment, courts have long been called upon to furnish guideposts for determining the punitive limits imposed by this constitutional provision.

¶ 31 One central guideline characterizing general Eighth Amendment analysis has been consideration of the proportionality of a sentence to the circumstances that the sentence addresses; that is, whether a particular sentence is so excessive, either with regard to the offense or the perpetrator, that it offends the Constitution. A punishment can be found to be disproportionate based upon a comparison between an individual defendant's crime and his sentence. *See*, *e.g.*, *Harmelin v. Michigan*, 501 U.S. 957 (1991) (considering and then affirming a mandatory life-without-parole term for cocaine possession). Moreover, the unconstitutionality of a sentence may be determined based upon the "nature of [the] offense" or upon specific characteristics of an entire class of offenders in connection with their sentences. *See*, *e.g.*, *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that the execution of offenders who were developmentally disabled constituted cruel and unusual punishments in violation of the Eighth Amendment). In *Atkins* the Court stated that it had reached this conclusion as a result of its focus upon the "precept of justice that punishment for crime should be graduated and proportioned

to [the] offense." *Id.* at 311 (alteration in original) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)). Three years later in *Roper*, the Court further noted that

> [t]he prohibition against "cruel and unusual punishments," like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual.

Roper, 543 N.C. at 560–61 (citing *Trop v. Dulles*, 356 U.S. 86, 100–101 (1958) (plurality opinion)).

¶ 32 Having identified this framework for purposes of Eighth Amendment analysis in the instant case, we recognize that a distinct proportionality analysis has been applied to another class of defendants: offenders who were juveniles at the time that they committed their respective crimes. When examining the sentencing of juvenile defendants in the crucible of the Eighth Amendment, we begin with a brief review of the pertinent precedent existing at the time of defendant's sentencing hearing, including—in sequential order of their issuance—the opinions in *Roper*, *Graham v. Florida*, *Miller*, and *Montgomery*.

¶ 33 In *Roper v. Simmons*, the Supreme Court of the United States considered whether the Eighth Amendment "bars capital punishment for juvenile offenders," specifically those defendants who were "older than 15 but younger than 18 years" of age at the time that they committed the underlying offenses. 543 U.S. at 555–56. The high Court considered a number of relevant factors, including the lack of a "national consensus in favor of capital punishment for juveniles," *id.* at 567, and observed that "the death penalty is reserved for a narrow category of crimes and offenders," the worst and most culpable offenders, *id.* at 569. The Supreme Court then described three general differences between juveniles and adults:

> First, as any parent knows and as the scientific and sociological studies . . . tend to confirm, a lack of maturity and an underdeveloped sense of responsibility

> are found in youth more often than in adults and are more understandable among the young. . . .
>
> The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. . . .
>
> The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.

Id. at 569–70 (extraneity omitted). Consequently, the highest legal forum opined that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Id.* at 570. Accordingly, the Supreme Court held that the imposition of a death sentence for an offender who was under the age of eighteen years at the time that the juvenile perpetrated the crime is unconstitutional. *Id.* at 578.

¶ 34 Subsequently, in *Graham v. Florida*, the United States Supreme Court considered "whether the Constitution permits a juvenile offender to be sentenced to life in prison without parole for a nonhomicide crime." 560 U.S. 48, 52–53 (2010). In an analysis similar to the scrutiny utilized in *Roper*, the eminent Court remarked that the practice of sentencing a juvenile who did not commit a homicide offense to a term of life in prison without the possibility of parole was exceedingly rare, that a national community consensus had developed against such sentences, and that none of the generally recognized goals of sentencing, such as retribution, deterrence, incapacitation, and rehabilitation, could justify imposition of a sentence of life without the possibility of parole for a juvenile offender. *Id.* at 62–67. Beyond these considerations, the Court also observed that

> [l]ife without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only.

Id. at 70 (citations omitted). Because a juvenile defendant's potential future danger to society and the youngster's ability to be rehabilitated for the rest of his life cannot be meaningfully evaluated at sentencing,

a judgment of life without parole denies a juvenile offender the chance to demonstrate his growth, maturity, and rehabilitation. *Id.* at 75. Thus, the Supreme Court held that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. . . . [and] if [a trial court] imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term." *Id.* at 82.

¶ 35 Two years after its issuance of *Graham*, the Supreme Court of the United States reviewed in *Miller v. Alabama* the constitutionality of mandatory life without the possibility of parole sentences for juveniles who committed murder. *Miller*, 567 U.S. at 465. The defendants in *Miller* were two fourteen-year-old juveniles who were "sentenced to life imprisonment without the possibility of parole. . . . [where] the sentencing authority [did not] have any discretion to impose a different punishment." *Id.* The defendant Miller

> was 14 years old at the time of his crime [and] had by then been in and out of foster care because his mother suffered from alcoholism and drug addiction and his stepfather abused him. Miller . . . regularly used drugs and alcohol; and he had attempted suicide four times, the first when he was six years old.

Id. at 467. In deciding *Miller*, the eminent tribunal first revisited the analysis and reasoning which it had applied in *Roper* and *Graham*, viewing the "[t]reat[ment] [of] juvenile life sentences as analogous to capital punishment." *Id.* at 475 (alterations in original) (quoting *Graham*, 560 U.S. at 89 (Roberts, C.J., concurring in judgment)). The Court then, in turn, harmonized this chain of juvenile law precedent with the series of case law decisions which emphasize that death sentences must be imposed only after consideration of the facts and circumstances of each individual case, *see*, *e.g.*, *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion), including the requirement that "a sentencer in a capital case must be allowed to consider the 'mitigating qualities of youth." *Johnson v. Texas*, 509 U.S. 350, 367 (1993). The Court ultimately held in *Miller* that the Eighth Amendment bars the automatic, mandatory imposition of a sentence of life without the possibility of parole for juvenile offenders, forecasting while simultaneously instructing that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon," even when a juvenile has committed a homicide offense. *Miller*, 567 U.S. at 479–80.[9]

9. Four years after *Miller*, the Supreme Court in *Montgomery* confirmed that its holding in *Miller* "announced a substantive rule of constitutional law" which applied

¶ 36 In response to the decision in *Miller*, the General Assembly enacted statutes that were intended to adapt North Carolina's juvenile sentencing guidelines to the United States Supreme Court's directives in *Miller*. *See State v. James*, 371 N.C. 77, 78 (2018); *see, e.g.*, N.C.G.S. § 15A-1340.19A ("Notwithstanding the provisions of G.S. 14-17, a defendant who is convicted of first[-]degree murder, and who was under the age of 18 at the time of the offense, shall be sentenced in accordance with this Part."). These so-called *Miller*-fix statutes provide, *inter alia*, that juvenile defendants who are convicted of first-degree murder solely by virtue of the felony murder rule[10] can only be sentenced to life in prison with the possibility of parole, N.C.G.S. § 15A-1340.19B(a)(1) (2019), and that in other circumstances where a sentence of life in prison without the possibility of parole would be available under the general sentencing provisions found in N.C.G.S. § 14-17, the trial court must conduct a sentencing hearing, *id.* § 15A-1340.19B(a)(2), (b) (2019). At the hearing, the juvenile defendant can present mitigation evidence on a number of factors:

(1) Age at the time of the offense.

(2) Immaturity.

(3) Ability to appreciate the risks and consequences of the conduct.

(4) Intellectual capacity.

(5) Prior record.

(6) Mental health.

(7) Familial or peer pressure exerted upon the defendant.

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retroactively and therefore could be raised by juvenile defendants in a post-conviction posture. 577 U.S. at 212. In so deciding, the Court in *Montgomery* reiterated that its decision in "*Miller* required that sentencing courts consider a child's 'diminished culpability and heightened capacity for change' before condemning him or her to die in prison," because "a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect 'irreparable corruption.' " *Id.* at 195. Because defendant here is challenging his initial sentence on direct appeal rather than bringing forward an argument arising from a post-conviction proceeding, making *Montgomery* not directly relevant to this defendant's appeal, nonetheless the language and reasoning of *Montgomery* informs our understanding of the *Roper*, *Graham*, and *Miller* line of cases as they may assist our resolution of the present case.

10. The felony murder rule affords the opportunity for the prosecuting government to charge a criminal defendant with murder in the event that the unlawful killing of an individual with whose murder the defendant is charged happened to occur during the defendant's commission of another felony offense.

> (8) Likelihood that the defendant would benefit from rehabilitation in confinement.
>
> (9) Any other mitigating factor or circumstance.

Id. § 15A-1340.19B(c) (2019). The sentencing court must then

> consider any mitigating factors in determining whether, based upon all the circumstances of the offense and the particular circumstances of the defendant, the defendant should be sentenced to life imprisonment with parole instead of life imprisonment without parole. The order adjudging the sentence shall include findings on the absence or presence of any mitigating factors and such other findings as the court deems appropriate to include in the order.

Id. § 15A-1340.19C(a) (2019).

¶ 37 The juvenile defendant's sentencing hearing in the current case occurred under the provisions of the *Miller*-fix statutes between the dates of 18 and 21 February 2019.[11] At his sentencing hearing, defendant argued that he was neither an incorrigible nor an irredeemable juvenile, and thus a sentence for him of life imprisonment without the possibility of parole was constitutionally impermissible. As noted above, the sentencing court agreed with defendant. The trial court entered findings of fact concerning the existence of numerous mitigating factors, and in its discretion, the trial court concluded that it would not sentence this juvenile defendant to a term of incarceration of life in prison without the possibility of parole. In this regard, the sentencing court acted in apparent conformity with *Miller* and all related appellate case law precedent.

¶ 38 Defendant's primary appellate argument concerns a question not yet directly addressed by the Supreme Court of the United States or by this Court: whether the effect of the imposition of active consecutive sentences of incarceration, each of which includes the possibility of parole, can be construed to operate to constitute a de facto sentence of life imprisonment without any meaningful opportunity to seek parole. As viewed in this particular case, where a sentencing court (1) found that a juvenile offender was not incorrigible and irredeemable, and (2) thereby imposed multiple sentences, each of which offers defendant an opportunity for parole, but (3) the sentences are decreed by the sentencing court

11. Although defendant raised a challenge to the constitutionality of these provisions in his presentation to the Court of Appeals, the entire appellate court panel rejected his argument; therefore, that issue is not before this Court on appeal.

to run consecutively so as to afford defendant the opportunity to seek parole only after defendant has served a minimum of forty-five years of incarceration, should the trial court be legally considered to have rendered a sentence of life imprisonment without the possibility of parole to the juvenile defendant in violation of constitutional protections?

¶ 39 After the imposition of defendant's consecutive sentences in this case and while his appeal was pending in this Court, the United States Supreme Court issued another opinion for addition to the *Roper-Graham-Miller-Montgomery* string of cases. In *Jones v. Mississippi*, the juvenile defendant contended that the sentencer must, in addition to acknowledging that a life without parole sentence cannot be mandatory but is instead discretionary for the sentencing authority when a sentence of life *without* the possibility of parole is imposed upon a juvenile offender, "make a separate factual finding that the defendant is permanently incorrigible, or at least provide an on-the-record sentencing explanation with an implicit finding that the defendant is permanently incorrigible." 141 S. Ct. 1307, 1311 (2021). The high court rejected this position on the basis that

> [i]n *Miller*, the Court mandated "only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing" a life-without-parole sentence. And in *Montgomery v. Louisiana*, which held that *Miller* applies retroactively on collateral review, the Court flatly stated that "*Miller* did not impose a formal fact-finding requirement" and added that "a finding of fact regarding a child's incorrigibility . . . is not required."

Id. (alteration in original) (citations omitted). In so stating, the Supreme Court attempted to provide direction that, under its precedent, sentencing courts are not required to make any specific finding regarding a juvenile's incorrigibility before imposing a life without parole sentence upon the juvenile, nor do they need to otherwise explain or justify the imposition of this most extreme of all sentences. *Id.* at 1313. Instead, the highest forum instructed that "[i]n a case involving an individual who was under 18 when he or she committed a homicide, a State's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient." *Id.*

¶ 40 In addition to concluding that "[t]he resentencing in Jones's case complied with [the Court's] precedents because the sentence was not mandatory and the trial judge had discretion to impose a lesser

punishment in light of Jones's youth," the United States Supreme Court explained that the appeal in *Jones* did "not properly present—and thus [the Court did] not consider—any as-applied Eighth Amendment claim of disproportionality regarding Jones's sentence." *Id.* at 1322. Finally, the Supreme Court recapitulated that

> like *Miller* and *Montgomery*, our holding today does not preclude the States from imposing additional sentencing limits in cases involving defendants under 18 convicted of murder. States may categorically prohibit life without parole for all offenders under 18. Or States may require sentencers to make extra factual findings before sentencing an offender under 18 to life without parole. Or States may direct sentencers to formally explain on the record why a life-without-parole sentence is appropriate notwithstanding the defendant's youth. States may also establish rigorous proportionality or other substantive appellate review of life-without-parole sentences. All of those options, and others, remain available to the States. Indeed, many States have recently adopted one or more of those reforms. But the U.S. Constitution, as this Court's precedents have interpreted it, does not demand those particular policy approaches.

Id. at 1323 (citations omitted).

¶ 41 Hence, in review, the current state of federal constitutional law regarding the imposition of the harshest sentences for juvenile offenders convicted of criminal offenses can be summarized as follows: (1) juvenile offenders may not be subject to the death penalty under any circumstances; (2) juvenile offenders may not be subject to mandatory life sentences without the possibility of parole; (3) state laws establishing juvenile sentencing parameters must, at a minimum, provide discretion to the sentencing authority to impose a lesser sentence than life without parole for juvenile offenders; (4) Supreme Court of the United States case precedent does not require a sentencing authority to make a specific finding that a juvenile offender is incorrigible before the sentencer exercises its discretion to impose a sentence of life without parole; (5) individual states are free to create additional limits and requirements regarding the sentencing of juvenile offenders; and (6) North Carolina's *Miller*-fix statutes, under which defendant here was sentenced, facially conform to the federal constitutional case law. While the federal constitutional law has continually been developed as the Supreme Court has

robustly unfurled this burgeoning area of juvenile law through its opinions, nonetheless, the nation's highest court has not expressly spoken on the particular question which we now address.

2. Claims under the North Carolina Constitution

¶ 42 In addition to defendant's contentions that his consecutive sentences constitute a violation of the Eighth Amendment to the Constitution of the United States as interpreted in the opinions of the Supreme Court of North Carolina governing terms of life imprisonment for juvenile offenders, defendant also argues that his sentences contravene article I, section 27 of the Constitution of North Carolina.[12] This portion of the state's constitution establishes: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted." N.C. Const. Art. I, § 27. Article I, section 27 is nearly identical to the Eighth Amendment with one difference in phraseology that bears some measure of significance. The two constitutional provisions diverge in their employment of different conjunctions in their final respective passages, with the United States Constitution prohibiting "cruel *and* unusual punishments" while the North Carolina Constitution bars "cruel *or* unusual punishments."

¶ 43 Applying the canons of construction, this apparent minor distinction in the terminology used in the two constitutional provisions is deceptively important. The use of the disjunctive "or" in article I, section 27 of the North Carolina Constitution's reference to "cruel *or* unusual punishments" plainly indicates that either of the two joined conditions is sufficient to invoke the stated prohibition. *See Routten v. Routten*, 374 N.C. 571, 575–76 (opining that "the disjunctive term 'or' in N.C.G.S. § 50-13.5(i) establishes that either of the circumstances is sufficient to justify the trial judge's decision to deny visitation" (citation omitted)), *cert. denied*, 141 S. Ct. 958 (2020); *see also Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 519 (2004) (noting "that the natural and ordinary meaning of the disjunctive 'or' permits compliance with either condition"). Thus, the language of article I, section 27 indicates that the state constitutional provision abrogates a range of sentences which is inherently more extensive in number by virtue of the provision's disjunctive term "or" than the lesser amount of sentences prohibited by the federal constitutional amendment due to its conjunctive term "and." On its face, the Constitution of North Carolina appears to offer criminal

12. We fully adopt here the state constitutional analysis employed in *State v. Kelliher*, 2022-NCSC-77, the companion case which this Court contemporaneously decides with the present one.

defendants—such as juvenile offenders—more protection against extreme punishments than the Federal Constitution's Eighth Amendment, because the Federal Constitution requires two elements of the punishment to be present for the punishment to be declared unconstitutional ("cruel *and* unusual"), while the state constitution only requires one of the two elements ("cruel *or* unusual").[13]

¶ 44 Upon further considering the construction of the constitutional phrases under examination, and with particular attention upon the individual term "cruel" and the individual term "unusual," we have acknowledged that

> this Court historically has analyzed cruel and/or unusual punishment claims by criminal defendants the same under both the federal and state Constitutions. As the [United States] Supreme Court stated in *Trop v. Dulles*, 356 U.S. 86, 2 L. Ed. 2d 630 (1958):
>
> > Whether the word "unusual" has any qualitative meaning different from "cruel" is not clear. On the few occasions this Court has had to consider the meaning of the phrase, precise distinctions between cruelty and unusualness do not seem to have been drawn. These cases indicate that the Court simply examines the particular punishment involved in light of the basic prohibition against inhuman treatment, without regard to any subtleties of meaning that might be latent in the word "unusual."
>
> *Id.* at 100 n.32, 2 L. Ed. 2d at 642 n. 32 (citations omitted). Thus, we examine each of defendant's contentions in light of the general principles enunciated by this Court and the Supreme Court guiding cruel and unusual punishment analysis.

State v. Green, 348 N.C. 588, 603 (1998) (citations omitted), *cert. denied*, 525 U.S. 1111 (1999).[14]

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13. It is unsurprising that the literal terminology of the North Carolina Constitution offers greater protections than the United States Constitution does. *See* John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 37 (2d ed. 2013) (commenting that the provisions contained in Article I "empower the state courts to provide protections going even beyond those secured by the U.S. Constitution").

14. In *Green* this Court considered, *inter alia*, "whether the sentencing of a thirteen-year-old . . . to a mandatory term of life imprisonment for first-degree sexual offense

¶ 45 Given the absolute bar on mandatory life in prison without the possibility of parole sentences as presumptively disproportionate for juvenile offenders—which legitimately implicates concerns about such punishments being "cruel"—coupled with the emphasis which the Supreme Court of North Carolina has placed on the presumed rarity with which life without parole sentences may constitutionally be imposed upon juvenile offenders—which would reasonably invoke apprehension about such punishments being "unusual"—the blurred differentiations as discussed in *Green* between a cruel sentence and an unusual sentence for a juvenile offender remain relevant under the *Miller* progeny of cases. Consistent with this durable view, we do not need to untangle the nuances of any distinctions between the protections against "cruel *and* unusual punishments" offered by the Eighth Amendment to the United States Constitution and the protections against "cruel *or* unusual punishments" offered by the North Carolina Constitution. The trial court here determined that defendant was not to be included in the "exceedingly rare" category of juvenile offenders who are incorrigible or irredeemable, and therefore, defendant could not be sentenced constitutionally to a term of life in prison without the possibility of parole even under the arguably lesser protections of the Eighth Amendment. Upon this premise, the implementation of a sentence of life without parole for defendant is a violation under the even more protective provisions of article I, section 27 of the Constitution of North Carolina.

B. De facto life sentences for purposes of juvenile sentencing

¶ 46 As we have discussed above, a juvenile offender such as defendant who has been expressly excluded by the sentencer from the rare group of juvenile offenders who can be considered incorrigible and permanently irredeemable at the time of sentencing *may not* be sentenced to a term of life in prison without the possibility of parole. As we also discussed earlier, the imposition of a sentence of life with the possibility of parole

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constitutes cruel and unusual punishment." 348 N.C. at 592. The defendant brought his challenge under applicable provisions of both the United States and North Carolina Constitutions. *Id.* at 602. In affirming the defendant's mandatory life without parole sentence, this Court opined in *Green* that "defendant's punishment in this case indicates it clearly comports with the 'evolving standards of decency' in society." *Id.* at 605. However, our decision in *Green* preceded the United States Supreme Court decisions in *Roper*, *Graham*, *Miller*, and *Montgomery*; consequently, the view of juvenile offenders exemplified in *Green* is in direct conflict with subsequent research and with our nation's evolution in its understanding of the culpability of juvenile offenders. Furthermore, the primary holding of *Green* does not comport with current precedent. While *Green* offers guidance on the meaning of the terms "cruel" and "unusual" as this Court has examined them individually and collectively, the case itself is no longer substantively applicable to the issue of mandatory life without parole sentences for juvenile offenders.

upon a juvenile offender such as defendant who has been convicted of first-degree murder on a legal principle other than the felony murder rule *is* constitutionally permissible. We are challenged to preserve these established sentencing parameters for juvenile offenders while adding the formidable complexity of the manner in which we should evaluate consecutive sentences that only allow the fruition of a defendant's initial parole eligibility after a lengthy term of incarceration in prison and at a point when a defendant is at an advanced age. In defendant's case, upon his receipt at the age of fifteen years of the two consecutive sentences imposed here, he will first become eligible to be considered for parole when he is sixty years old.

¶ 47 For juvenile offenders in North Carolina, a life sentence with the possibility of parole permits this category of young perpetrators to seek parole upon the completion of twenty-five years in prison. *See* N.C.G.S. § 15A-1340.19A (providing that a defendant must "serve a minimum of 25 years [of] imprisonment prior to becoming eligible for parole"). In considering the effect of the imposition of multiple terms of active consecutive sentences upon a juvenile offender, while all of them officially could afford a defendant the possibility of parole, there arrives a point at which the combination of the length of active terms of incarceration—albeit expressly affording the possibility of parole—becomes tantamount to a life sentence without parole for the juvenile offender. This would occur at the juncture when the juvenile offender has been incarcerated for such a protracted period of time that the possibility of parole is no longer plausible, practical, or available. A juvenile offender's opportunity for parole, in light of the sentencing authority's determination that the defendant is neither incorrigible nor irredeemable but is instead worthy to have a chance for release to parole, must be an opportunity which is realistic, meaningful, and achievable. The opportunity must be implementable, instead of amounting to a mere formal announcement of a juvenile sentence allowing the possibility of parole, but which in reality is illusory and only elevates form over substance. *See*, *e.g.*, *M.E. v. T.J.*, 2022-NCSC-23 ¶ 1 ("For well over a century, North Carolina courts have abided by the foundational principle that administering equity and justice prohibits the elevation of form over substance.") (first citing *Currie v. Clark*, 90 N.C. 355, 361 (1884) ("This would be to subordinate substance to form and subserve no useful purpose."); then citing *Moring v. Privott*, 146 N.C. 558, 567 (1908) ("Equity disregards mere forms and looks at the substance of things."); and then citing *Fid. & Cas. Co. of N.Y. v. Green*, 200 N.C. 535, 538 (1931) ("To hold otherwise, we apprehend, would be to exalt the form over the substance.")). We do not authorize an empty opportunity for parole which is more akin to a mirage

in its attainability than a realistic occasion for a redeemable juvenile to be rehabilitated as contemplated by the Supreme Court of the United States in its series of opinions addressing juvenile punishments which we have cited and applied. *Cf. Shore v. Edmisten*, 290 N.C. 628, 633 (1976) ("In determining whether a given payment is a fine or restitution, the label given by the judge (or the legislature) is not determinative.").

¶ 48 The implementation of a clear directive establishing the maximum limit of carceral time that may be served by redeemable juvenile offenders before they may have an opportunity to seek parole is venturesome. Any categorical sentencing rule is open to criticism as perhaps too lenient on one hand, in light of the circumstances of the commission of crimes or the characteristics of the victims, or as perhaps too harsh on the other hand given the characteristics of the juvenile offender's life and circumstances. Inherently, all determinations regarding sentencing include some element of the arbitrary: length, type, degree, and the like. Requiring completion of twenty-five years of imprisonment before a redeemable juvenile offender can seek parole following imposition of a single sentence of life with the possibility of parole, which was implemented as a feature of North Carolina's *Miller*-fix statutes, is a convenient and pertinent example of the selection of a period of incarceration which must be served and which was established with some modicum of arbitrariness. This state's Structured Sentencing Act scheme is replete with further illustrations of arbitrarily determined, though reasonably reached, provisions designed to promote fairness in sentencing. *See* N.C.G.S. §§ 15A-1340.10 to -1340.23 (2021).

¶ 49 We recognize and appreciate the direction provided by the Supreme Court of the United States in *Miller* that individualized *sentencing* for juveniles is required. 567 U.S. at 465. We also recognize and appreciate the existing criminal justice processes in North Carolina for the sentencing of juveniles who have been convicted of first-degree murder which have been established by the General Assembly through statutory enactments and which have been interpreted by this Court through the application of governing state laws and constitutional provisions, as well as the application of the principles enunciated by the United States Supreme Court, to cases which have been decided by this Court. In this regard, our determination of a definitive guideline for the maximum length of incarceration which a juvenile offender can serve before the possibility of parole must be accorded to the young perpetrator sentenced to life with the possibility of parole must adhere to a trial court's ability to determine whether a juvenile offender should be sentenced to life with the possibility of parole or life without the possibility of parole

following hearings conducted under the *Miller*-fix statutes, coupled with a trial court's discretion to decree that a juvenile offender's multiple sentences will run concurrently or consecutively pursuant to N.C.G.S. § 15A-1354. Specifically, in a hearing held pursuant to the *Miller*-fix statutes, the State and the juvenile offender may introduce evidence regarding the defendant's past and current circumstances as well as the nature of the crime or crimes for which the defendant is being sentenced, with the trial court being obligated to consider such evidence in determining whether potential parole is appropriate for the individual juvenile offender. All evidence of record, along with other relevant and insightful information, may further inform the trial court's decision regarding whether multiple sentences should run concurrently or consecutively for a particular defendant being addressed. *See, e.g.*, *State v. Arrington*, 371 N.C. 518, 526 (2018) (stating that trial courts are "presumed to know the law") (quoting *Sanders v. Ellington*, 77 N.C. 255, 256 (1877)). This circumstance addresses the aspect of *Miller* which holds that juveniles cannot constitutionally be subject to mandatory life sentences without the possibility of parole. 567 U.S. at 479–80.

¶ 50 Another focus of the reasoning discussed in *Miller* and its lineage of cases is the heightened appropriateness for redeemable juvenile offenders to have the opportunity to demonstrate their readiness for the prospect of parole at a subsequent age of maturity and following some term of incarceration. The time period during which the traditional parole process is nearing for the juvenile offender to become eligible for parole and decide to seek release from incarceration represents a more meaningful and developed juncture for such a parole determination to be made for the juvenile offender by a parole body which is deemed to be suitably tailored, equipped, and empowered to reach an enlightened determination. This approach and eventuality conspicuously comport with the Supreme Court's observations in *Graham* which are cited above.

¶ 51 A proper balance of these considerations compels us to conclude that it is permissible and necessary to establish a specific maximum duration of time for the incarceration of a juvenile offender to serve who was not determined to be incorrigible or irredeemable, and who was sentenced to life with the possibility of parole, before the defendant is eligible to be considered for parole. While the unique circumstances of each juvenile offender must be individually considered for purposes of sentencing, nonetheless, there must be a commonality of fundamental requirements which uniformly recognizes all of the attendant legal mandates and influences in operation. As such, the establishment

of a definitive point at which all redeemable juvenile offenders must be allowed to apply for parole is desirable.

¶ 52 In setting a clear directive for the beginning of parole eligibility for redeemable juveniles who have been convicted of at least one count of first-degree murder, we note that there are a variety of potential ages of defendants or completed terms of incarceration from which to choose. As we delve into this matter, we find it is essential to recognize that in any juvenile prosecution which results in an outcome of multiple convictions and a subsequent sentencing proceeding, the number, as well as the type, of offenses charged and for which a defendant is ultimately convicted impacts the eventual sentences imposed as well as the implementation of the service of those sentences as consecutive or concurrent. Such considerations typically include the additional harms caused to the immediate victims and their family members, in conjunction with the injury inflicted upon society by the commission of multiple offenses. We further acknowledge that some cases are susceptible to convenient inferences which may be drawn regarding a juvenile offender's culpability when an offender has committed multiple crimes and which may also influence the tenor of the sentences which are administered.

¶ 53 We first address defendant's position that "[t]his Court should set a bright-line rule that no redeemable juvenile may be sentenced to more than twenty-five years in prison before parole eligibility." In support of this tenure of incarceration to be served by a juvenile offender prior to eligibility for parole, defendant cites the language of the *Miller*-fix statutes which provides that "[i]f the sole basis for conviction of a count *or each count* of first[-]degree murder was the felony murder rule, then the court shall sentence the defendant to life imprisonment with parole" and contends that this statutory decree "indicates that our General Assembly has determined parole eligibility at 25 years for multiple offenses sanctionable by life with parole is not so excessive as to run afoul of *Miller*." *State v. Kelliher*, 273 N.C. App. 616, 643 (2020) (quoting N.C.G.S. § 15A-1340.19B(a)(1) (emphasis added), *disc. review allowed*, 376 N.C. 900 (2021)). Defendant asserts that

> [p]arole eligibility after no more than twenty-five years would also be consistent with the lines drawn by other jurisdictions. "[I]n the flurry of legislative action that has taken place in the wake of *Graham* and *Miller*, many of the new statutes have allowed parole eligibility for juveniles sentenced to long prison terms for homicides to begin after fifteen or twenty-five years of incarceration." *Null*, 836

> N.W.2d at 72, 72 n.8 (collecting statutes). Moreover, the United States Supreme Court specifically pointed to Wyoming's statute providing parole eligibility after twenty-five years as an appropriate means of complying with *Miller*. *Montgomery*, 193 L. Ed. 2d at 622 (citing Wyo. Stat. Ann. §6-10-301(c) (2013)). Virginia just recently established parole eligibility after only twenty years for every offender under eighteen who is convicted of "a single felony offense or multiple felony offenses." Va. Code Ann. §53.1-165.1. (2020).

Defendant also cites the Model Penal Code, which recommends that for offenders under age eighteen, "[n]o sentence of imprisonment longer than [25] years may be imposed for any offense *or combination of offenses*." Model Penal Code: Sentencing § 6.11A(g) (Am. L. Inst., Proposed Final Draft Apr. 10, 2017) (emphasis added). For offenders who, like defendant, are under the age of sixteen when they committed their crimes, the Model Penal Code recommends "no sentence of imprisonment longer than [20] years." *Id.*

¶ 54 In evaluating defendant's argument based upon these instructive authorities, this Court must balance the tensions between the guidance from the decisions of the Supreme Court of the United States that parole eligibility should be set at a point sufficiently far in the future to provide a redeemable juvenile offender enough time to mature, rehabilitate, and develop a record which would enable the defendant to show a parole authority that he or she should be released, but yet sufficiently early enough in the defendant's life to enable the juvenile offender to experience worthwhile undertakings outside of prison in the event that parole is granted. We must also give due weight to the General Assembly's enactment of N.C.G.S. § 15A-1354, which unequivocally gives trial courts the discretion to decide whether multiple sentences should run concurrently or consecutively. *See* N.C.G.S. § 15A-1354(a) ("When multiple sentences of imprisonment are imposed on a person at the same time . . . the sentences may run either concurrently or consecutively, as determined by the court.").

¶ 55 To set parole eligibility for all juvenile offenders at a maximum of twenty-five years would negate the full discretion delegated to trial courts by the General Assembly in N.C.G.S. § 15A-1354(a) to choose between the imposition of multiple sentences in a concurrent or consecutive manner, because it would require that all redeemable juvenile offenders would thus be eligible for parole after serving the statutory minimum term of incarceration before parole eligibility that applies upon

a single conviction of first-degree murder standing alone, even where theoretically a redeemable juvenile offender has been convicted of multiple counts of first-degree murder or where, as in the actual case at bar, a redeemable juvenile offender has been convicted of one or more other offenses in addition to one count of first-degree murder. Therefore, we decline to adopt defendant's view that twenty-five years should be the clear directive which this Court establishes as the maximum duration of penal time to be served by a redeemable juvenile offender prior to eligibility for parole. We also decline to hold that the Constitutions of the United States and North Carolina require that, where a redeemable juvenile is convicted of multiple counts of first-degree murder or a single count of first-degree murder plus one or more lesser offenses, the trial court must order the resulting sentences to run concurrently. The implementation of any of these available options would have the effect of rendering N.C.G.S. § 15A-1354 meaningless for redeemable juvenile offenders who have been convicted of multiple counts of first-degree murder or convicted of a single count of first-degree murder along with other lesser offenses.

¶ 56 We next consider the State's proposal as to the moment in time to mark the establishment of a juvenile offender's eligibility for parole, whether upon the completion of a specific amount of incarceration, the juvenile offender's attainment of a certain age, or some other criteria.[15] Much of the State's argument focuses on the assertion that

> *Graham* simply says the states must "give defendants like *Graham* . . . some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75. . . . [but also emphasizes] that the states are "not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime." *Id.* The Eighth Amendment simply prohibits states from making that determination at the outset. *Id*. As such, there is no guarantee in *Graham* that a juvenile offender will eventually be released, reenter society, and have a career, spouse, and/or family.

15. The State's stance as discussed here is its submission of an alternative argument, because the State's primary position is that "[n]either *Graham*, *Miller*, nor [their] progeny have considered or addressed aggregate sentencing for multiple criminal offenses; rather, those decisions narrowly focused on a single sentence arising out of a single conviction and have no application here." First and foremost, the State views as mere dicta the language from those cases upon which we have relied for our conclusion regarding the unconstitutional creation of de facto life without parole sentences for redeemable juveniles.

We fully agree with the State's interpretation of this segment of *Graham* that redeemable juvenile offenders are not *entitled* to release during their life sentences. Nonetheless, as discussed above, such juvenile offenders are entitled to have the opportunity to *seek* parole by demonstrating that their crimes were the result of "transient immaturity," that they have matured since the perpetration of their crimes and have redeemed themselves, and that they are worthy of release from prison and reentry into society. *See Montgomery*, 577 U.S. at 208.

¶ 57 Beyond its argument that defendant's forty-five-year minimum term of imprisonment before becoming eligible for parole is not a de facto life without parole sentence, the State does not expressly endorse a specific maximum term of incarceration that a juvenile offender can serve before possessing an opportunity to seek parole. However, the State cites cases from other jurisdictions which have held that "to be released in his or her late sixties or early seventies satisf[ies] the 'meaningful opportunity' requirement. . . . because in today's society, it is not unusual for people to work well into their seventies and have a meaningful life well beyond age 62 or even at age 77." *State v. Smith*, 892 N.W.2d 52, 65–66 (Neb. 2017) (opining that parole eligibility at age sixty-two cannot be considered "a 'geriatric release' " and does not "equate[ ] to 'no chance for fulfillment outside prison walls' "), *cert. denied*, 138 S. Ct. 315 (2017). While we agree that some people thankfully are able to enjoy rewarding lives as they achieve chronological ages reaching into their sixties, seventies, and beyond, we find this prospect to be loftily optimistic when applied to the category of individuals who have spent several decades in prison.

¶ 58 Noting that "[m]any courts have concluded that a sentence of a term of years that precludes parole consideration for a half century or more is equivalent to a sentence of life without parole," *Carter v. State*, 192 A.3d 695, 728 (Md. 2018), we do not regard a custodial period of fifty years or more prior to a juvenile offender's eligibility for parole to constitute a meaningful opportunity for a defendant to seek release, given that most juvenile offenders will not achieve such longevity. *See*, *e.g.*, ACLU of Mich. Juv. Life Without Parole Initiative, Michigan Life Expectancy Data for Youth Serving Natural Life Sentences 2 (visited on 03/17/2017) (reporting that the average life expectancy for juvenile offenders who received natural life sentences was 50.6 years), http://www.lb7.uscourts.gov/documents/17-12441.pdf; U.S. Sent'g Comm'n, Life Sentences in the Federal System 10, 23 n. 52 (Feb. 2015) (defining a de facto life sentence as beginning at 470 months—39 years and two months—because such a sentence is "consistent with the average life expectancy

of federal criminal offenders") https://www.ussc.gov/sites/default/files/pdf/research-and-publications/ research-projects-and-surveys/miscellaneous/20150226_Life_Sentences.pdf. Considered in this framework, this Court's establishment of a term of fifty years as the maximum amount of carceral time that a juvenile offender must serve before obtaining the opportunity to demonstrate to a parole authority the defendant's worthiness of release would, for the proven majority of these defendants, amount to the same illusion which spawns the determination that de facto life sentences for redeemable juvenile offenders constitute cruel or unusual punishment or both. Under a fifty-year threshold of incarceration before the arrival of parole eligibility, most juvenile offenders in North Carolina who were granted the possibility of parole at their sentencing hearings would die in prison before ever having the anticipated chance of one day showing that they are worthy of release.

¶ 59 Instead, this Court draws from the above-referenced resource, the United States Sentencing Commission, and its instructive guidance regarding the determination of a de facto life sentence. Equipped with such a helpful tool of reference, this Court establishes the quantum of forty years of incarceration as the point in time at which a juvenile offender who has not been deemed to be incorrigible or irredeemable by a trial court, and who is serving a sentence of life imprisonment with the possibility of parole, is eligible to seek release pursuant to parole provisions. This outcome respects both the discretion of trial courts to statutorily elect to order multiple sentences for a juvenile offender to run either concurrently or consecutively *and* the constitutional rights of those juvenile offenders who trial courts determine are eligible to be considered for parole despite the imposition of a life sentence to evade cruel and unusual punishment through the establishment of a reasonable maximum duration of incarceration prior to a juvenile offender's eligibility for parole. This conclusion does not require the allowance of parole for any particular juvenile offender after forty years, nor does this conclusion guarantee the release of any of these defendants at any age. This conclusion merely eliminates the creation of an unconstitutional de facto life without the possibility of parole sentence for a redeemable juvenile offender who was given a life with the possibility of parole sentence, and does so by instituting a uniform and ascertainable juncture which is reasonably calculated and which is reasonably achievable by redeemable juvenile offenders. Conversely, this determination mandates that criminal offenders who perpetrate their offenses as juveniles and who receive sentences which permit parole must, after forty years of incarceration, *have the opportunity* to demonstrate their worthiness of release.

¶ 60 The recognition of a forty-year term of incarceration as a reasonable maximum duration of imprisonment to be served by a juvenile offender who has not been deemed by a trial court to be incorrigible or irredeemable, and who is serving a sentence of life imprisonment with the possibility of parole, is an appropriate length of incarceration prior to parole eligibility which affords such a defendant with a realistic, meaningful, and achievable opportunity for release to parole, while simultaneously setting parole eligibility far enough in the juvenile offender's future to allow the defendant adequate time to mature, rehabilitate, and develop a record upon which to show a potential readiness for parole. Such considerations are consistent with the prohibition of the infliction of "cruel *and* unusual punishments" addressed in the Eighth Amendment to the United States Constitution and the prohibition of the infliction of "cruel *or* unusual punishments" mentioned in article I, section 27 of the Constitution of North Carolina. The forty-year determination is also authorized and fortified by article I, section 1 of this state's constitution which identifies "certain inalienable rights" of "all persons," including "life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness." Despite their violations of criminal law, juvenile offenders who are deemed by the trial courts of North Carolina to be eligible for parole after these defendants' respective terms of incarceration are still regarded to be worthy of a chance to work themselves back into positions in the free society to potentially experience fulfilling undertakings outside of prison in the event that parole is granted.

¶ 61 In assessing defendant's "meaningful opportunity to obtain release" in the present case—as the phrase was utilized by the Supreme Court of the United States in its decision in *Graham v. Florida*, 560 U.S. at 123—it is enlightening to view the operation of the identified forty-year term of incarceration to be served prior to his eligibility for parole. Defendant was fifteen years and six months of age at the time that he perpetrated the offenses for which he is incarcerated. He received an aggregate minimum sentence of forty-five years of imprisonment before he is positioned to be considered for parole. Consequently, defendant would be sixty years of age at the time that he initially becomes eligible to seek parole. According to the mortality tables which are embodied in North Carolina General Statutes Section 8-46, a person who has completed the age of fifteen years is expected to live for an additional 61.7 years. Since this juvenile offender in the instant case had completed the age of fifteen years at the time of the commission of his criminal offenses which has resulted in his ongoing imprisonment, he has a projected life expectancy pursuant to North Carolina law of 76.7 years. Adding the age of defendant at the time that his incarceration began—fifteen years, six

months—to an active sentence of forty years to be served in custody prior to eligibility for parole—the *earliest* opportunity that the juvenile offender would be eligible for release from prison would be upon his attainment of the age of fifty-five years and six months. Furthermore, the expected amount of remaining life expectancy which defendant would possess after his earliest possible release from prison to parole would be 21.1 years of life, according to the mortality tables of this state.

¶ 62 Defendant's sentencing circumstances in the instant case are remarkably similar to those which existed for the defendant in the Michigan case of *Kitchen v. Whitman*, 486 F. Supp. 3d 1114 (2020). The defendant Kitchen, who committed a series of criminal offenses at the age of seventeen years, was sentenced to a minimum of forty-two years of incarceration by a state trial court. Defendant challenged his sentence under the Eighth Amendment to the United States Constitution, the corresponding provision of the Michigan Constitution, the Equal Protection Clause, and the Due Process Clause. In ultimately deciding to appoint new counsel to represent defendant in the proceedings, the federal district court consulted life expectancy tables in evaluating the defendant's claims under *Miller*, *Graham*, and other cases and determined that the defendant Kitchen's life expectancy was seventy-seven years, virtually identical to defendant's life expectancy here of 76.7 years pursuant to the North Carolina mortality tables; that the defendant "Kitchen's first parole review is at age 59," 486 F. Supp. 3d at 1128, akin to the present defendant's age of fifty-five years and six months when parole eligibility arose; and that defendant Kitchen's "opportunity for release would come 18 years before he is expected to die," *id.*, close to the current defendant's 21.1 more projected years of life after his potential release from prison to parole. In light of these circumstances in the case of defendant Kitchen, the federal district court noted these milestones of time in stating: "That would be a 'meaningful opportunity' even under a reading of *Graham* that includes time to reintegrate into society." *Id.* Since the salient circumstances of defendant in the present case are commensurate with the same circumstances of defendant Kitchen in the Michigan case regarding the evaluative measures of the two juvenile offenders' relative ages when these defendants committed their respective crimes, their respective life expectancies, their relative ages at the times of their respective opportunities for parole eligibility, and their relative projected remaining life spans in the event that these defendants would obtain parole in their first efforts, the defendant Kitchen's forty-two-year term of incarceration prior to parole eligibility is sufficiently compatible with defendant's maximum forty-year term of incarceration prior to parole eligibility in order to further substantiate the identification of

a forty-year term of incarceration as a reasonable maximum duration of imprisonment to be served by a juvenile offender who has not been deemed by a trial court to be incorrigible or irredeemable, and who is serving a sentence of life imprisonment with the possibility of parole.

¶ 63 The dissent misguidedly conflates our installation of a juvenile offender's realistic opportunity to obtain parole eligibility when given a life with the possibility of parole sentence as a component of consecutive sentences for the commission of multiple crimes with the dissent's misapprehension that we have determined that a violent juvenile offender shall obtain mandatory parole eligibility. Regrettably, the dissent further obfuscates our decision by spouting that we have declared that mandatory parole eligibility is established by the United States Constitution and the North Carolina Constitution, when in reality we have cited and followed the opinions of the Supreme Court of the United States which itself has linked a juvenile offender's "realistic opportunity to obtain release before the end of" a term of a life sentence to constitutional protections. This alarming confusion exhibited by the dissent regarding our adherence to the precedent of the Supreme Court is heightened by the dissent's failure to capably distinguish our obligation to follow the edicts of our nation's highest court from the dissent's own unsubstantiated pronouncement that somehow our decision is based on the dissent's projection upon us of some desired policy, rather than on existing appellate case law precedent. Although the dissent boldly intones its incredulity that we have implemented the principles articulated by the Supreme Court of the United States concerning this area of juvenile sentencing, and while the dissent bluntly expresses its exasperation that we have preserved constitutional protections for juvenile offenders in a manner consistent with governing appellate case law, nonetheless we have striven to continue this Court's respected and revered approach to attempt to achieve the best resolution of challenging cases of first impression in North Carolina without resort to collateral clatter.

III. Conclusion

¶ 64 By virtue of the trial court's judgment in the juvenile's case, defendant here was expressly determined to be included in the category of juvenile offenders who should retain the opportunity to seek parole, despite his convictions for the offenses of first-degree murder and first-degree rape. After serving forty years of incarceration for these crimes pursuant to the implementation of consecutive sentences, defendant possesses the opportunity to be considered for parole. To compel defendant to serve a term of incarceration in excess of forty years upon the trial court's determination that defendant, in light of his status as a juvenile, is neither

incorrigible nor irredeemable, would unconstitutionally constitute a de facto life sentence. Accordingly, we reverse the decision of the Court of Appeals as to the appealable issue before us. The remaining issues addressed by the Court of Appeals are not properly before this Court and its decision as to these issues remains undisturbed. We remand this case to the Court of Appeals for further remand to the trial court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Justice BERGER dissenting.

¶ 65 While the Supreme Court has determined that "sentencing an offender who was under 18 at the time of the crime raises special constitutional considerations," *Jones v. Mississippi*, 141 S. Ct. 1307, 1314, 209 L. Ed. 2d 390, 399 (2021), it has never held that the Eighth Amendment prohibits consecutive sentences for multiple crimes or guarantees release of a juvenile offender convicted of violent felonies. *See Graham v. Florida*, 560 U.S. 48, 75, 130 S. Ct. 2011, 2030, 176 L. Ed. 2d 825, 845 (2010) ("A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime.") The majority, however, inserts mandatory parole eligibility after forty years for violent juveniles convicted of multiple crimes into our State's structured sentencing scheme. According to the majority, mandatory parole eligibility for juveniles convicted of multiple violent offenses can be found in the state and Federal Constitutions. I respectfully dissent.

I. Factual and Procedural Background

¶ 66 On March 11, 2016, defendant brutally raped Felicia Porter and beat her to death with a shovel. Defendant broke her arm and nearly every bone in her face. Her front teeth were knocked out. Defendant was questioned by law enforcement multiple times and provided a myriad of lies while attempting to conceal his involvement in Felicia's murder.[1]

¶ 67 Upon his plea of guilty, defendant was sentenced to consecutive terms of imprisonment of 240 to 348 months in prison for first degree

1. Defendant identified one of his friends as the culprit. The factual recitation during defendant's plea proceeding indicates that defendant at one point told officers that he went to Ms. Porter's with Brad Adams. According to defendant, Mr. Adams hit Ms. Porter with a brick and raped her. Because of defendant's fabricated story, Mr. Adams had to provide a DNA sample and alibi to clear himself of defendant's accusations. The DNA sample obtained by law enforcement and video surveillance images from a local business exonerated Mr. Adams.

forcible rape and "a minimum of 25 years" for murder. *See* N.C.G.S. §§ 15A-1340.19A and 15A-1354(a) (2021). Pursuant to the trial court's judgment, defendant would be eligible for parole after forty-five years in prison, when he would be sixty years old.

¶ 68 Defendant appealed to the Court of Appeals, arguing that consecutive sentences are impermissible under the *Miller*-fix statutes, and that the sentences violated the Eighth Amendment to the United States Constitution and Article I, Section 27 of the North Carolina Constitution because the sentences operated as the functional equivalent of life without parole.[2]

¶ 69 In a split decision, the Court of Appeals majority determined that trial courts may impose consecutive sentences under N.C.G.S. § 15A-1340.19A. In addition, the Court of Appeals majority concluded that defendant was eligible for parole when he is sixty years old, and, therefore, the forty-five-year sentence did not amount to de facto life in prison given his life expectancy. *State v. Conner*, 275 N.C. App. 758, 760, 853 S.E.2d 824, 825 (2020).

¶ 70 Although in agreement that consecutive sentences are not prohibited by N.C.G.S. §§ 15A-1340.19A to 15A-1340.19D, the dissenting judge nonetheless would have found that defendant's forty-five-year sentence amounted to a de facto sentence of life without parole and is, therefore, unconstitutional. The dissent further reasoned that defendant's possible "geriatric release . . . does not provide a 'meaningful opportunity' to demonstrate the 'maturity and rehabilitation' required to obtain release and reenter society as required by *Graham*." *Id.* at 777, 853 S.E.2d at 835 (McGee, C.J., concurring in part and dissenting in part) (alteration in original) (quoting *State v. Null*, 836 N.W. 2d 41, 71 (Iowa 2013)). Instead, the dissenting judge suggested that a defendant is owed "more than the mere act of release or a de minimis quantum of time outside of prison." *Id.* at 777, 853 S.E.2d at 835 (cleaned up).

¶ 71 On appeal to this Court, defendant contends that precluding parole eligibility until the age of sixty amounts to a sentence of life without parole and thus is violative of the state and Federal Constitutions.

II. Discussion

¶ 72 "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., amend. VIII.

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2. Defendant also argued that the trial court erred in imposing lifetime SBM. This issue is not before the Court.

VIII. Similarly, the North Carolina constitution prohibits "cruel or unusual punishments." N.C. Const. art. I, § 27. As noted by Chief Justice Newby in his dissent in *State v. Kelliher*, Article XI provides clarification as to the meaning of "cruel or unusual punishments" in Article I, § 27. *State v. Kelliher*, 2022-NCSC-77, ¶ 118 (2022) (Newby, C.J., dissenting). Specifically, permissible criminal punishments in North Carolina are restricted to those listed in Article XI, which include that of "death" and "imprisonment." N.C. Const. art. XI, § 1. Given that these particular punishments are expressly authorized by our constitution, they cannot be " 'cruel or unusual' within the prohibition of Article I, Section 27. John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 84 (2d ed. 2013).

¶ 73 Providing further instruction, Article XI, Section 2 limits the use of the punishment of death to "murder, arson, burglary, and rape . . . if the General Assembly shall so enact." N.C. Const. art. XI, § 2. Accordingly, the power to determine the appropriate punishment for crimes, even the most severe, is constitutionally, and solely, granted to the legislature. It is not a power this Court possesses.

¶ 74 Nonetheless, "this Court historically has analyzed cruel and/or unusual punishment claims by criminal defendants the same under both the federal and state Constitutions," despite the variation in the disjunctives. *State v. Green*, 348 N.C. 588, 603, 502 S.E.2d 819, 828 (1998). Further,

> [w]hether the word "unusual" has any qualitative meaning different from "cruel" is not clear. On the few occasions this Court has had to consider the meaning of the phrase, precise distinctions between cruelty and unusualness do not seem to have been drawn. These cases indicate that the Court simply examines the particular punishment involved in light of the basic prohibition against inhuman treatment, without regard to any subtleties of meaning that might be latent in the word "unusual."

Id. at 603, 502 S.E.2d at 828 (quoting *Trop v. Dulles*, 356 U.S. 86, 100 n.32, 78 S. Ct. 590, 598 n.32, 2 L. Ed.2d 630, 642 n.32 (1958)).

¶ 75 The Supreme Court has had many opportunities in recent years to examine juvenile sentencing in light of the Eighth Amendment. In *Roper v. Simmons*, the Supreme Court held that the Eighth Amendment prohibits the death penalty for murderers under the age of eighteen. 543 U.S. 551, 578, 125 S. Ct. 1183, 1200, 161 L. Ed. 2d 1, 28 (2005). In *Graham*, the Supreme Court outlawed imposition of life without parole

sentences for juveniles convicted of nonhomicide crime. 560 U.S. at 82, 130 S. Ct. at 2034, 176 L. Ed. 2d at 850. In *Miller v. Alabama*, mandatory life without parole was determined to be a permissible sentence under the Eighth Amendment for juveniles convicted of homicide provided that the trial court has discretion to impose a different punishment. 567 U.S. 460, 483, 132 S. Ct. 2453, 2471, 183 L. Ed. 2d 407, 430 (2012). *Miller* was made retroactive through the Supreme Court's opinion in *Montgomery v. Louisiana*, 577 U.S. 190, 136 S. Ct. 718, 193 L. Ed. 2d. 599 (2016). Most recently, the Supreme Court expressly stated that a state court need not find "permanent incorrigibility" to sentence a defendant under the age of eighteen to life in prison without parole. *See Jones*, 141 S. Ct. at 1318, 209 L. Ed. 2d at 404 (2021) (determining that defendant's "argument for requiring a finding of permanent incorrigibility is unavailing because *Montgomery* explicitly stated that '*Miller* did not impose a formal factfinding requirement' and that 'a finding of fact regarding a child's incorrigibility . . . is not required.' ") (alteration in original) (quoting *Montgomery*, 577 U,S, at 211, 136 S.Ct. at 735, 193 L.Ed. 2d. at 599).

¶ 76 Because "[a] State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime," *Graham*, 560 U.S. at 75, 130 S. Ct. at 2030, 176 L. Ed. 2d at 845, defendant's consecutive sentences resulting in parole eligibility do not run afoul of the Eighth Amendment or our traditional approach under Article I, Section 27 of the North Carolina Constitution. It seems unusual then that the majority would conclude that defendant's possible sentence of forty-five years with parole is constitutionally suspect, especially since defendant committed two separate violent crimes — homicide and rape.

¶ 77 Even if, as the majority contends, defendant falls into the category of offenders addressed in *Graham*, i.e., defendants sentenced to life without parole for a nonhomicide crime, the sentence imposed by the trial court is permissible. In *Graham*, the defendant received a sentence of life without parole for armed burglary, and a concurrent sentence of fifteen years for attempted robbery. *Id.* at 57, 130 S. Ct. at 2020, 176 L. Ed. 2d at 834. The Supreme Court noted that the State need only provide "defendants like Graham some meaningful *opportunity to obtain release* based on demonstrated maturity and rehabilitation." *Id.* at 75, 130 S. Ct. at 2030, 176 L. Ed. 2d at 845-46 (emphasis added). Accordingly, there is no requirement in *Graham* that a juvenile convicted of multiple violent crimes, including homicide, be guaranteed release.

¶ 78 The majority, however, expands straightforward language from an "opportunity to obtain release" to an "opportunity to seek parole . . . early enough in the defendant's life such that he can experience a

meaningful life outside of prison." This constitutional evolution is based solely on the majority's desired policy preferences.

¶ 79 "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6. This Court has repeatedly stated that it is solely for the legislature to determine the appropriate punishment for individuals convicted of crime. *See State v. Gardner*, 315 N.C. 444, 453, 340 S.E.2d 701, 708 (1986) ("[T]he substantive power to prescribe crimes and determine punishments is vested with the legislature . . . .") (quoting *Ohio v. Johnson*, 467 U.S. 493, 499, 104 S. Ct. 2536, 2541, 81 L. Ed. 2d 425, 433 (1984)); *see also*, *Green*, 348 N.C. at 605, 502 S.E.2d at 829 ("[I]t is the role of the legislature and not the courts to decide the proper punishment for individuals convicted of a crime."); *State v. Cradle*, 281 N.C. 198, 209, 188 S.E.2d 296, 303 (1972) ("It is within the province of the General Assembly of North Carolina and not the judiciary to determine the extent of punishment which may be imposed on those convicted of crime. If the sentence pronounced here seems harsh, the executive branch of government acting through the Board of Paroles may lawfully commute it.").

¶ 80 Nonetheless, the majority darts into the legislative lane, usurping legislative authority by enacting its new law simply because they find this result "desirable" for violent juveniles. The majority's judicial sentencing scheme which introduces de facto life in prison and implements mandatory parole eligibility after forty years in prison is supposedly "mandate[d]" by the state and Federal constitutions. But one toils to locate this fiction in the text of either document or precedent. The majority even admits that they are "challenged" by their trespass into legislative drafting, lamenting the difficulty of the task they have chosen to undertake. But unlike the legislature, the majority creates their new law with no input from justice system stakeholders – save defendant's attorney and a host of ideologically aligned amici.[3]

¶ 81 Equally troubling is what the majority fails to address. There is no direction to the trial courts and prosecutors on how to properly handle violent juvenile offenders who commit multiple violent crimes on

3. As Justice Scalia famously noted, "The problem with a living Constitution in a word is that somebody has to decide how it grows and when it is that new rights are — you know — come forth. And that's an enormous responsibility in a democracy to place upon nine lawyers, or even 30 lawyers." Bruce Allen Murphy, *Justice Antonin Scalia and the 'Dead' Constitution*, N.Y. Times (Feb. 14, 2016), http://nytimes.com/2016/02/15/opinion/justice-antonin-scalia-and-the-dead-constituion.html.

multiple days. If these violent offenders are tried, convicted, and sentenced at separate sessions of superior court, does the de facto life sentence and mandatory forty-year parole eligibility rationale apply such that they receive a "volume discount"? *State v. Soto-Fong*, 250 Ariz. 1, 8, 474 P.3d 34, 41 (2020) (citation omitted). "[G]enerally, courts do not permit defendants to 'stack' their crimes to generate an Eighth Amendment claim," *id.* at 8, 474 P.3d at 41, but violent juvenile crime sprees may yield a different result in North Carolina under the majority's reasoning.

¶ 82 Here the trial court appropriately considered defendant's individual circumstances in sentencing him to consecutive terms of imprisonment. The trial court, in its discretion, determined that imposition of consecutive sentences was appropriate for this defendant. The resulting sentences imposed are not in conflict with the U.S. Constitution, Supreme Court precedent, or the law of this State and should be upheld.

Chief Justice NEWBY and Justice BARRINGER join in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
VAN BUREN KILLETTE, SR.

No. 379PA18-2

Filed 17 June 2022

Appeal and Error—petition for certiorari—authority of Court of Appeals—exercise of discretion

The decision of the Court of Appeals to deny a criminal defendant's petition for a writ of certiorari to review an order of the trial court denying his motion to suppress was, for the second time, vacated and remanded with instructions for the Court of Appeals to exercise its discretion in determining whether to allow or deny defendant's petition on its merits. The Supreme Court overruled prior Court of Appeals decisions that incorrectly held or implied that the Court of Appeals lacks authority to issue a writ of certiorari in similar circumstances or that Appellate Rule 21 limits its authority to do so.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 268 N.C. App. 254 (2019), dismissing

defendant's appeal and denying defendant's petition for writ of certiorari after remand by this Court after appeal from a judgment entered on 6 July 2017 by Judge Thomas H. Lock in Superior Court, Johnston County. Heard in the Supreme Court on 11 May 2022.

Joshua H. Stein, *Attorney General*, *by Nicholas R. Sanders*, *Assistant Attorney General*, *for the State-appellee.*

Glenn Gerding, *Appellate Defender*, *by Katy Dickinson-Schultz*, *Assistant Appellate Defender*, *for defendant-appellant.*

HUDSON, Justice.

¶ 1 Defendant petitioned this Court for review of a unanimous decision of the Court of Appeals. Upon review, we vacate and remand to the Court of Appeals.

I. Background

¶ 2 In August and September of 2014, the Johnston County Sheriff's Office received anonymous tips by phone that Van Buren Killette Sr. (defendant) was manufacturing and selling methamphetamine in his home, as well as receiving stolen property. After learning that defendant was on probation at the time, Detective C.J. House and Detective Jay Creech of the Johnston County Sheriff's Office contacted Officer Ashley McRae, defendant's probation officer. Officer McRae agreed to conduct a search of defendant's home.

¶ 3 On 30 September 2014, after arriving at defendant's home, Officer McRae asked defendant for permission to conduct a search. Defendant consented to the search. The search uncovered stolen property and items frequently used to manufacture methamphetamine. Defendant was subsequently indicted for breaking or entering, larceny, manufacturing methamphetamine, possession of methamphetamine precursors, possession of methamphetamine, maintaining a dwelling for the purpose of keeping and selling a controlled substance, and conspiring to manufacture methamphetamine.

¶ 4 On 18 June 2015, Department of Social Services Agent M. Williams and detectives from the Johnston County Sheriff's Office were investigating an unrelated drug complaint. However, the subject of that separate investigation informed the officers that she frequently provided defendant with pseudoephedrine in exchange for methamphetamine. Because Agent Williams had reason to believe that children might be

present and at risk in defendant's home, officers visited defendant's home that same night. Upon arriving, they observed several individuals fleeing defendant's home and running towards the woods. Believing that they could smell methamphetamine in defendant's home, the officers conducted a "safety sweep" of the home and quickly identified equipment and ingredients used to manufacture methamphetamine. The next day, 19 June 2015, Detective Jason Guseman of the Johnston County Sheriff's Office applied for, received, and executed a search warrant. Officers seized methamphetamine, precursor chemicals, manufacturing equipment, and other evidence from defendant's home. Defendant was charged with manufacturing methamphetamine, possession of precursor chemicals, conspiracy to manufacture methamphetamine, resisting a public officer, and trafficking in methamphetamine.

¶ 5 On 29 March 2017, defendant filed two motions to suppress the evidence obtained via the 2014 and the 2015 searches. The motion to suppress the 2014 evidence was heard on 3 May 2017. A written order denying the motion to suppress was entered by Judge Thomas H. Lock on 7 July 2017. The motion to suppress the 2015 evidence was denied on 18 May 2017, and a written order to that effect was entered by Judge Beecher Gray on 7 June 2017.

¶ 6 On 6 July 2017, defendant pled guilty to two counts of manufacturing methamphetamine. The charges were consolidated and defendant received an active sentence of 120 to 156 months. In exchange for defendant's plea, the State dismissed the remaining charges.

¶ 7 On 10 July 2017, defendant filed a handwritten notice of appeal. On appeal, defendant only challenged the denial of his motion to suppress evidence obtained during the 2014 search. Because defendant failed to notify the State of his intent to appeal prior to the entry of his plea agreement, defendant also petitioned for a writ of certiorari in an attempt to secure review of the trial court's order regarding the evidence from the 2014 search.

¶ 8 On 2 October 2018, the Court of Appeals dismissed defendant's appeal and denied his petition for a writ of certiorari. *State v. Killette* (*Killette I*), No. 18-26, 2018 WL 4701970, at *3 (N.C. Ct. App. Oct. 2, 2018) (unpublished). The court held that defendant had forfeited his right to appeal when he failed to provide notice prior to entering his guilty plea. *Killette I*, 2018 WL 4701970, at *2 (citing *State v. Tew*, 326 N.C. 732, 735 (1990)). The Court of Appeals further held that it lacked authority under Rule 21 of the North Carolina Rules of Appellate Procedure to issue the writ. *Killette I*, 2018 WL 4701970, at *3 (citing *State v. Harris*, 243 N.C.

App. 137, 141 (2015)). Defendant then petitioned this Court for discretionary review.

¶ 9 We remanded for reconsideration in light of *State v. Ledbetter*, 371 N.C. 192 (2018), and *State v. Stubbs*, 368 N.C. 40 (2015). In these decisions, the Court holds that Rule 21 does not limit the Court of Appeals' jurisdiction or bear on the decision to issue a writ of certiorari. *Ledbetter*, 371 N.C. at 197 ("Rule 21 does not prevent the Court of Appeals from issuing writs of certiorari or have any bearing upon the decision as to whether a writ of certiorari should be issued."); *Stubbs*, 368 N.C. at 44 ("[W]hile Rule 21 might appear at first glance to limit the jurisdiction of the Court of Appeals, the Rules cannot take away jurisdiction given to that court by the General Assembly in accordance with the North Carolina Constitution."). Accordingly, we instructed the Court of Appeals to exercise its discretion in deciding whether to allow or deny defendant's petition.

¶ 10 On remand, the Court of Appeals again denied defendant's petition. *State v. Killette* (*Killette II*), 268 N.C. App. 254, 258 (2019). The Court of Appeals repeatedly indicated that defendant's failure to provide timely notice of his intent to appeal was fatal to his petition. *Id.* at 256 ("[W]hen a defendant pleads guilty without first notifying the State of the intent to appeal a suppression ruling, the defendant 'has not failed to take timely action,' and thus 'this Court is without authority to grant a writ of certiorari.' " (quoting *State v. Pimental*, 153 N.C. App. 69, 77, *disc. review denied*, 356 N.C. 442 (2002))); *see also id.* at 258 ("Defendant's petition does not assert his 'failure to take timely action.' "). The court held that it was required to deny the petition under *Tew*, *Pimental*, and *Harris*. *See id.* at 257 ("Under well-settled precedents, we disregard [*State v.*] *Davis* [237 N.C. App. 22 (2014)] and follow *Tew*, *Pimental*, and *State v. Harris* as the earlier, binding precedents.").

¶ 11 The court seemed to briefly acknowledge that it had jurisdiction over the petition and that it could choose to exercise its discretion and issue a writ of certiorari. *See id.* at 258. However, it determined that the reasoning in *Tew*, *Pimental*, and *Harris* was sound and required denying defendant's petition. *See id.* ("Even if *Tew*, *Pimental* and *Harris* were not binding on the issues here—and they are—within any jurisdictional discretion to allow the petition, we would follow and apply their reasoning.").

¶ 12 Judge Inman wrote separately to express disapproval with the majority's holding that *Tew*, *Pimental*, and *Harris* "are binding on our exercise of discretion in this case." *Id.* at 258–59 (Inman, J., concurring).

While *Tew* delt with a defendant's statutory right of appeal, it said nothing about a defendant's right to petition for a writ of certiorari. *Id.* at 259 (citing *Ledbetter*, 371 N.C. at 197). Judge Inman also concluded that *Pimental* and *Harris* did not control in light of *Ledbetter* and *Stubbs*. *Id.* at 259–60 (first citing *Ledbetter*, 371 N.C. at 197; and then citing *State v. Thomsen*, 369 N.C. 22, 27 (2016)). Judge Inman nevertheless agreed that defendant's petition should be denied. *Id.* at 260.

¶ 13 Defendant again petitioned this Court for discretionary review under N.C.G.S. § 7A-31. Defendant argued that the Court of Appeals improperly determined that *Pimental* and *Harris* control and that this error perpetuates a misapprehension of law regarding jurisdiction and authority to issue prerogative writs. On 3 February 2021 we allowed the petition for discretionary review.

II. Analysis

¶ 14 This is the second time this Court has reviewed the Court of Appeals' denial of defendant's petition for writ of certiorari and the second time that the Court of Appeals has apparently acted believing that it had no choice but to deny the petition. In its opinion, despite acknowledging our opinions to the contrary in *Ledbetter* and *Stubbs* and *Thomsen*, the court said our prior decision in *Tew* and its own prior decisions in *Pimental* and *Harris* are "binding," requiring that the petition be denied. *Killette II*, 268 N.C. App. at 257. To be sure, our decisions in *Ledbetter*, *Stubbs*, and *Thomsen* should have made it clear that the Court of Appeals possessed jurisdiction and authority to exercise its discretion in reviewing and deciding to allow or deny defendant's petition. Accordingly, we vacate the Court of Appeals decision and remand, again, for that court to exercise its discretion in determining whether to allow or deny defendant's petition.

¶ 15 As we stated most recently in *Ledbetter*, "[r]egardless of whether Rule 21 contemplates review of defendant's motion to dismiss, this Court made it clear in both *Stubbs* and *Thomsen* that 'if a valid statute gives the Court of Appeals jurisdiction to issue a writ of certiorari, Rule 21 cannot take it away.' " 371 N.C. at 196 (quoting *Thomsen*, 369 N.C. at 27). Also in *Ledbetter*, we described the very error repeated by the Court of Appeals here:

> By concluding it is procedurally barred from exercising its . . . jurisdiction in this appeal, the Court of Appeals has, as a practical matter, set its own limitations on its jurisdiction to issue writs of certiorari. . . . [I]n the absence of a procedural rule explicitly

> allowing review, such as here, the Court of Appeals should turn to the common law to aid in exercising its discretion rather than automatically denying the petition for writ of certiorari . . . .

Id. In its new brief to this Court, the State as appellee acknowledged as much: "This Court has made clear in *Stubbs*, *Thomsen*, and *Ledbetter* that the Court of Appeals 'maintains broad jurisdiction to issue writs of certiorari unless a more specific statute revokes or limits that jurisdiction' and that 'Rule 21 does not prevent the Court of Appeals from issuing writs of certiorari or have any bearing upon the decision as to whether a writ of certiorari should be issued.' "

¶ 16 Consistent with this recent precedent, we hold that the Court of Appeals has jurisdiction and authority to issue the writ of certiorari here, although it is not compelled to do so, in the exercise of its discretion. Accordingly, we vacate the Court of Appeals decision here and remand to that court to exercise its discretion to allow or deny the petition for writ of certiorari on its merits. In addition, we overrule *Pimental*, *Harris*, and any other Court of Appeals decisions that incorrectly hold or imply that the Court of Appeals lacks jurisdiction or authority to issue a writ of certiorari in similar circumstances, or which suggest that Rule 21 limits its jurisdiction or authority to do so.

¶ 17 *It is so ordered.*

VACATED AND REMANDED.

Justice BERGER did not participate in the consideration or decision of this case.

TOSHIBA GLOBAL COMMERCE SOLUTIONS, INC.
v.
SMART & FINAL STORES LLC

No. 181A21

Filed 17 June 2022

Jurisdiction—personal—minimum contacts—nonresident business—services agreement—substantial connection with North Carolina

In a breach of contract action brought by a North Carolina-based company (plaintiff) against a nonresident business (defendant), the trial court did not err by determining that defendant was subject to personal jurisdiction in North Carolina based on unchallenged findings establishing that the services agreement entered into by both parties—under which plaintiff was to maintain and repair point-of-sale equipment from defendant's stores—had a substantial connection with North Carolina. Due process was not offended where defendant intentionally solicited plaintiff, which it knew to be based in North Carolina; the parties entered into a multiyear contract for ongoing services; the contract required any written notices to be sent to plaintiff in North Carolina; and plaintiff shipped thousands of parts from and performed thousands of repairs at its depot in North Carolina to meet its contractual obligations.

Appeal pursuant to N.C.G.S. § 7A-27(a)(3) from an order and opinion denying defendant's motion to dismiss for lack of personal jurisdiction entered on 23 December 2020 by Judge Adam M. Conrad, Special Superior Court Judge for Complex Business Cases, in Superior Court, Durham County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(a). Heard in the Supreme Court on 21 March 2022.

Robinson, Bradshaw & Hinson, P.A., by Erik R. Zimmerman, Edward F. Hennessey IV, Matthew W. Sawchak, and Benjamin C. DeCelle; and Kenneth B. Hammer, for plaintiff-appellee.

Ellis & Winters LLP, by Paul K. Sun Jr. and Kelly Margolis Dagger, for defendant-appellant.

BARRINGER, Justice.

¶ 1 In this matter, we must consider whether the trial court erred by denying a nonresident defendant's motion to dismiss for lack of personal jurisdiction. Plaintiff Toshiba Global Commerce Solutions, Inc. (Toshiba) is based in Durham, North Carolina, and brought this action against Smart & Final Stores LLC (Smart & Final) for breach of contract and related claims. Smart & Final, a California company that operated warehouse-style grocery stores in the western United States, contacted Toshiba during its search for a service provider to maintain and repair the point-of-sale equipment that Smart & Final uses at its stores. In March 2019, negotiations between the parties resulted in the Master Maintenance Services Agreement (Services Agreement), in which Toshiba agreed to provide maintenance and repair services for point-of-sale equipment at all Smart & Final stores for three years. According to the complaint, Smart & Final refused to pay overage fees as required by the Services Agreement and terminated the Services Agreement without cause in April 2020. As addressed in more detail herein, on the record before us and claims alleged, the Due Process Clause of the Fourteenth Amendment does not preclude the courts of this State from entering a judgment binding on Smart & Final. Therefore, we conclude that the trial court did not err by denying Smart & Final's motion to dismiss for lack of personal jurisdiction.

I. Personal Jurisdiction

¶ 2 "The Fourteenth Amendment's Due Process Clause limits a state court's power to exercise jurisdiction over a defendant." *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024 (2021). Specifically, "[t]he Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful contacts, ties, or relations." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471–72 (1985) (cleaned up).

¶ 3 As articulated in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), a defendant who is not subject to general jurisdiction in a forum state or present in the forum state must "have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id.* at 316 (cleaned up). This jurisdiction—known as specific jurisdiction—"exists when the cause of action arises from or is related to defendant's contacts with the forum." *Skinner v. Preferred Credit*, 361 N.C. 114, 122 (2006). The relationship with the forum "must arise out of contacts that the 'defendant *himself*' creates with the forum [s]tate." *Walden v. Fiore*, 571 U.S. 277, 284 (2014) (quoting *Burger King*, 471 U.S. at 475). While the quality and nature of defendant's activity with the forum state may

vary, "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum [s]tate, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Thus, consistent with the foregoing, the Supreme Court of the United States has recognized that jurisdiction exists without offending the Due Process Clause when "the suit was based on a contract which had substantial connection with that [s]tate." *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957).

II. Analysis

¶ 4 Toshiba initiated this action against Smart & Final in Superior Court, Durham County, North Carolina, alleging breach of the Services Agreement and related claims. Smart & Final moved to dismiss the complaint for lack of personal jurisdiction pursuant to Rule 12(b)(2) of the North Carolina Rules of Civil Procedure. Both parties submitted affidavits and exhibits in support of and opposition to Smart & Final's motion, and a hearing was held, but testimony was not taken at the hearing.

¶ 5 In this context, when the parties have submitted affidavits and exhibits but no evidentiary hearing is held, the trial court must determine the weight and sufficiency of the evidence before it. *See* N.C.G.S. § 1A-1, Rule 43(e) (2021); *Banc of Am. Sec. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 694 (2005). However, pursuant to Rule 52(a)(2) of the North Carolina Rules of Civil Procedure, the trial court need not make specific findings of fact in support of its order unless requested by a party. N.C.G.S. § 1A-1, Rule 52(a)(2) (2021). If in deciding the motion the trial court makes findings of fact, they are conclusive on appeal when unchallenged or supported by competent evidence even when there is a conflict in the evidence. *See, e.g.*, *Morse v. Curtis*, 276 N.C. 371, 378 (1970) ("We recognize the often-repeated rule that findings of fact by a trial judge are conclusive when supported by competent evidence, even when there is [a] conflict in the evidence, but an exception to a finding of fact not supported by competent evidence must be sustained."); *Fungaroli v. Fungaroli*, 51 N.C. App. 363, 367 (1981) (applying this rule to the Court of Appeals' review of a trial court's order denying a motion to dismiss for lack of personal jurisdiction).

¶ 6 In this matter, the trial court found facts and ultimately determined that the Services Agreement had "a substantial connection with North Carolina."[1] Although Smart & Final makes arguments concerning the

1. Since Smart & Final does not advance an argument on appeal concerning North Carolina's long-arm statute, N.C.G.S. § 1-75.4 (2021), we do not address the long-arm statute herein.

competency of evidence supporting some portions of the trial court's findings, Smart & Final has not challenged the following findings of fact [2]:

> 4. Based in Durham, North Carolina, Toshiba makes and sells point-of-sale products used by retailers—for example, scanners, monitors, and related checkout devices. It also offers support services for its products and those made by others.
>
> 5. Smart & Final is a California company that operates a chain of warehouse-style grocery stores in the western United States. Until recently, one of its subsidiaries operated restaurant supply and wholesale food stores in the same region.
>
> 6. In late 2017, Smart & Final began searching for a service provider to maintain and repair point-of-sale equipment at its stores. One of the vendors it contacted was Toshiba. The parties promptly signed a nondisclosure agreement, notable only because it lists Toshiba's North Carolina address at the top. Over the next few months, Toshiba sent pitch materials and a formal proposal for a mix of products and services. Toshiba touted its technology (hardware and software), national presence (a fleet of technician vans coupled with a network of stocking locations to house inventory), and support infrastructure (a central repair depot and an "expert staff of trained personnel . . . at our corporate HQ" in North Carolina). Ultimately, though, Smart & Final went with a different vendor.
>
> 7. Evidently, that relationship didn't work out, and soon Smart & Final was looking for a new vendor. It reached out to Toshiba a second time and requested another proposal. Most of the negotiations took place via e-mail and telephone between Smart & Final representatives in California and Toshiba

2. The trial court listed some of the following findings of fact under the subheading "Conclusions of Law." However, this Court can and should disregard the trial court's labels when necessary to apply the appropriate standard of review. *In re M.C.*, 374 N.C. 882, 890 (2020). Therefore, to properly review the issue before us, we have listed the trial court's unchallenged findings of fact even if they appear in the paragraphs following the subheading "Conclusions of Law." Further, for readability, the trial court's citations to the record and caselaw have been omitted.

representatives in California and Texas. There was also at least one in-person meeting at Smart & Final's California headquarters.

8. This time, the negotiations were fruitful, producing a services agreement in March 2019. In a nutshell, Toshiba agreed to provide maintenance and repair services for point-of-sale equipment at all Smart & Final stores for three years. Smart & Final could renew the agreement for additional one-year terms with written notice to Toshiba's North Carolina headquarters. A choice-of-law provision states that New York law governs the agreement.

9. Smart & Final selected two service options: "On-Site Repair" and "Advanced Exchange Plus." On-Site Repair means just what it says: a Toshiba technician would travel to a given store and try to repair defective equipment on site. Advanced Exchange Plus, on the other hand, is a replacement service. This option calls for the technician to replace the defective part with a working unit taken from inventory called seed stock. Although Smart & Final could have chosen to own and maintain the seed stock itself, it shifted that burden to Toshiba. Toshiba also took responsibility for installing replacement parts and for "the return of the [defective] Product back to [its] depot."

10. Both service options are geared toward addressing problems as they arise. Determined "to operate [its] stores without interruption," Smart & Final put a premium on speed. The agreement specifies response times and performance goals typically based on same-day or next-day service. Along with making its technicians available seven days a week, Toshiba agreed to "provide an infrastructure and support structure to meet" its obligations.

11. These requirements are reflected in the price. Attachment A details the prices for repair and replacement services for dozens of products, based in part on estimates of the amount of seed stock needed, the expected response time, and the number of anticipated service calls. It also states various

pricing assumptions, including that Toshiba would own the seed stock and "image/configure units during the receive and repair process at our Depot." For the Advanced Exchange Plus option, the price sheet assumes that a "technician will meet [the] part on-site that is shipped from the Toshiba depot," noting that the replacement "part for [a] failed unit [would be] available under Next Business Day support."

12. Although the agreement doesn't say so, the "depot" is part of Toshiba's "Tricenter operations hub" in North Carolina. This is where Toshiba managed the seed stock and repaired failed equipment throughout its relationship with Smart & Final. Before the "go live date" for the services agreement, employees at the depot estimated the seed stock needed to get started, procured it (because Smart & Final used non-Toshiba equipment), and then shipped it to field technicians and stocking locations. As time went by, the depot received and repaired equipment that technicians could not fix on site. The depot then returned these repaired items to the seed stock or, if a part was beyond repair, replenished the stock with new equipment.

13. Over the course of their relationship, Toshiba handled about 7,200 repair tickets for Smart & Final. Some involved purely on-site repairs. Many others required support from Toshiba's depot in North Carolina. The depot recorded more than 4,200 shipments of parts to replenish inventory and more than 2,600 repairs for parts removed from Smart & Final stores—about seven percent of the repairs and replenishments performed for all Toshiba customers.

14. Less than a year into their relationship, the parties split. Toshiba alleges that the equipment covered by the agreement failed at rates far higher than Smart & Final predicted during negotiations, triggering hefty overage fees. As alleged, Smart & Final refused to pay and then terminated the agreement without cause in April 2020, more than two years before its scheduled expiration. Toshiba sued for breach of contract and related claims.

. . . .

26. . . . Smart & Final initiated contact with a resident of this State and created a continuing relationship involving services that were performed both within and outside North Carolina.

. . . .

29. Smart & Final was well aware when it contacted representatives of Toshiba that it was soliciting business from a North Carolina-based entity. The nondisclosure agreement that preceded negotiations has Toshiba's address right at the top. . . . [T]he services agreement . . . requires all notices to go to Toshiba's Durham headquarters. Furthermore, . . . Smart & Final is a large, sophisticated company deeply familiar with the market for point-of-sale products and services. At no point has Smart & Final claimed surprise to find that Toshiba is based in North Carolina.

. . . .

31. . . . In less than a year, Toshiba recorded thousands of shipments from its North Carolina base to maintain seed stock and replenish inventory, along with more than 2,600 repairs of parts taken from Smart & Final stores. This was not only a substantial part of the services performed for Smart & Final but also an appreciable part of the repair and replenishment services that Toshiba performed as a whole.

32. . . . Smart & Final had the option to keep its seed stock in house so that Toshiba would be responsible only for labor at affected stores. Instead, Smart & Final put the burden on Toshiba to create and maintain the seed stock and to provide the infrastructure needed for same-day and next-day services. . . .

33. . . . [I]t is undisputed that Smart & Final did not come to North Carolina or perform any services here.

. . . .

> 35. . . . Toshiba actually performed a substantial portion of its [contractual] obligations in the State. . . .
>
> 36. Finally, in some rare cases, it may be unreasonable or inconvenient to exercise jurisdiction even when the defendant has the requisite minimum contacts with the forum. Smart & Final has not made that argument here.

¶ 7 Since these binding findings of fact are sufficient to support personal jurisdiction over Smart & Final under this Court's and the Supreme Court of the United States' precedent for the reasons addressed herein, we need not address Smart & Final's challenges to any other findings of fact or the arguments concerning the disputed findings of fact.

¶ 8 Further, we do not find the standard of review determinative in this matter. This Court has implicitly endorsed that whether personal jurisdiction exists is a question of fact and that appellate courts do not review de novo a trial court's determination of personal jurisdiction but assess whether the determination is supported by competent evidence in the record. *Ponder v. Been*, 275 N.C. App. 626, 636–37 (2020) (Stroud, J., dissenting), *rev'd per curiam for reasons stated in the dissent*, 380 N.C. 570, 2022-NCSC-24; *Eluhu v. Rosenhaus*, 159 N.C. App. 355, 357 (2003), *aff'd per curiam*, 358 N.C. 372 (2004). "However, when the pertinent inquiry on appeal is based on a question of law[,] . . . we conduct de novo review." *Da Silva v. WakeMed*, 375 N.C. 1, 5 (2020). Whether reviewing the finding of personal jurisdiction for competent evidence or de novo, we hold that the trial court did not err by denying the motion to dismiss for lack of personal jurisdiction because the Services Agreement had a substantial connection with this State.

¶ 9 The Supreme Court of the United States recognized over half a century ago that the Due Process Clause does not preclude a state court from entering a judgment binding on a contracting party when "the suit was based on a contract which had substantial connection with that [s]tate." *McGee*, 355 U.S. at 223. *McGee* addressed a state's personal jurisdiction over a nonresident life insurance company. *Id.* at 221. The nonresident life insurance company had no offices or agents in the forum state and "ha[d] never solicited or done any insurance business in [the forum state] apart from the policy involved [in the case]." *Id.* at 222. The Court concluded that the forum state had jurisdiction over the nonresident life insurance company because the contract had a substantial connection with the forum state. *Id.* at 223. "The contract was delivered in

[the forum state], the premiums were mailed from there and the insured was a resident of that [s]tate when he died." *Id.*

¶ 10 A few decades later, the Supreme Court of the United States in *Burger King* revisited personal jurisdiction in the context of a contractual dispute. 471 U.S. at 463–64. The Court explained that there is no mechanical test for determining jurisdiction between contracting parties; it does not turn on "the place of contracting or of performance," *id.* at 478 (quoting *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, 316 (1943)), and "an individual's contract with an out-of-state party *alone* can[not] automatically establish sufficient minimum contacts in the other party's home forum," *id.* at 478. Instead, "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing [are the factors] that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum." *Id.* at 479.

¶ 11 After analyzing the facts relating to these factors, the Supreme Court of the United States in *Burger King* concluded that there was substantial record evidence supporting the trial court's determination "that the assertion of personal jurisdiction over [the nonresident individual in the forum state] for the alleged breach of his franchise agreement did not offend due process." *Id.* at 478. Notably, the nonresident individual had "no physical ties" to the forum state; he had never visited and did not maintain offices in the forum state. *Id.* at 479. However, "th[e] franchise dispute grew directly out of 'a contract which had a *substantial* connection with that [s]tate.' " *Id.* (quoting *McGee*, 355 U.S. at 223).

¶ 12 While this case differs in some respects from *Burger King*, our analysis of the facts before us, as informed by applicable precedent, leads us to conclude that the assertion of personal jurisdiction over Smart & Final for the alleged breach of the Services Agreement and related claims does not offend due process. Specifically, as discussed below, the undisputed facts concerning the "contemplated future consequences," "terms of the contract," and "actual course of dealing" all support a determination that the Services Agreement is a contract with a substantial connection with the State of North Carolina.

¶ 13 First, Smart & Final intentionally solicited a company that it knew to be based in North Carolina and sought a service provider to maintain and repair point-of-sale equipment through that solicitation. Between late 2017 and early 2019, this solicitation occurred twice. This is substantively analogous to *Burger King* where the defendant challenging jurisdiction negotiated with an out-of-state corporation and such

negotiations were not for a one-off transaction but for a "long-term franchise." *Id.* at 479. The *Burger King* defendant "[e]schew[ed] the option of operating an independent local enterprise" and pursued a contract with "the manifold benefits that would derive from affiliation with a nationwide organization." *Id.* at 479–80. While the relationship between the parties in this case is not of franchisor and franchisee as in *Burger King*, Smart & Final contacted a company based in North Carolina to provide ongoing services in lieu of servicing its point-of-sale equipment itself. The sought relationship, thus, was not a one-off transaction, such as a one-time purchase of goods, but a contractual relationship sought by Smart & Final knowing that Toshiba was based in North Carolina.

¶ 14 Second, Smart & Final and Toshiba did enter into a contract, the Services Agreement, in March 2019. In that contract, Toshiba agreed to provide maintenance and repair services for point-of-sale equipment at all Smart & Final stores for three years. Smart & Final could also renew the Services Agreement for additional one-year terms by sending a written notice to Toshiba's North Carolina headquarters. Thus, the contract and relationship formed because of Smart & Final's solicitation of a company based in North Carolina was not a one-off transaction but one involving ongoing services for at least three years. While the Services Agreement does not contemplate a twenty-year relationship like in *Burger King*, it nevertheless established a substantial relationship that was contemplated to potentially extend beyond three years.

¶ 15 Third, pursuant to the Services Agreement, Toshiba took responsibility for installing replacement parts on-site from inventory shipped from the Toshiba depot and for returning defective equipment back to Toshiba's depot. During the course of the parties' relationship, the depot was located in North Carolina and was where Toshiba managed and repaired the inventory. Employees at the depot in North Carolina estimated the inventory needed to fulfill its responsibilities under the Services Agreement, procured it, and shipped it to field technicians and stocking locations. Thereafter, the depot in North Carolina received and repaired defective equipment that could not be fixed on-site and returned the repaired (or new) equipment to field technicians and stocking locations. The depot in North Carolina recorded "more than 4,200 shipments of parts to replenish inventory" and "more than 2,600 repairs for parts removed from Smart & Final stores."

¶ 16 Fourth, the Services Agreement required that any written notice required under the Services Agreement be directed to Toshiba's office in North Carolina. As summarized by Smart & Final in its brief, Smart & Final "gave notice, addressed to Toshiba's Durham office, that it was

exercising its contractual right to terminate the [Services] Agreement" on 1 April 2020. One month later, Toshiba sued for nonpayment and contended that Smart & Final breached the Services Agreement "by terminating [it] without a contractual basis to do so."

¶ 17 Given the foregoing facts, the "contemplated future consequences" as reflected in "the terms of the contract" involved Toshiba maintaining a depot to meet its contractual obligations. *Burger King*, 471 U.S. at 479. Furthermore, "the parties' actual course of dealing" showed that Toshiba used a depot in North Carolina to meet its contractual obligations by performing a substantial number of repairs at and shipments from the depot. *Id.* On average, there were over seven repairs a day at the depot in North Carolina and over eleven shipments a day from the depot in North Carolina. The "terms of the contract" also dictated that any written notice required by the Services Agreement be sent to Toshiba's office in North Carolina, and "the parties' actual course of dealing" showed that Smart & Final sent written notice to Toshiba in North Carolina to terminate the Services Agreement. These undisputed facts concerning the "contemplated future consequences," "terms of the contract," and "actual course of dealing" all support a determination that the Services Agreement is a contract with a substantial connection with the State of North Carolina.

¶ 18 Nevertheless, Smart & Final argues that "[t]he only link between this case and North Carolina is that [Smart & Final] contracted with Toshiba, which has its corporate headquarters in North Carolina." According to Smart & Final, Smart & Final's solicitation of a North Carolina-based company does not show purposeful availment because Smart & Final did not reach into North Carolina by sending an agent physically to North Carolina or by physically sending e-mails or letters to North Carolina. In Smart & Final's view, it merely directed contact to Toshiba, not North Carolina. Smart & Final also contends that because the Services Agreement did not require performance within North Carolina, Toshiba's conduct in North Carolina to fulfill its contractual obligations under the Services Agreement are unilateral acts and not evidence of Smart & Final's purposeful availment of the North Carolina forum.

¶ 19 The contractual negotiations between Smart & Final and Toshiba did occur outside of North Carolina, and Smart & Final did not come to or perform any services in North Carolina. Thus, Smart & Final is correct that this case does not involve contacts with North Carolina from Smart & Final's agents being physically present in North Carolina. Nevertheless, "physical presence in [North Carolina] is not a prerequisite to jurisdiction." *Walden*, 571 U.S. at 285. The defendants in both

Burger King and *McGee* had no physical presence in the forum state. *Burger King*, 471 U.S. at 479; *McGee*, 355 U.S. at 222.

¶ 20 Additionally, the fact that contract negotiations and formation occurred outside North Carolina does not foreclose jurisdiction in this case. In *Burger King*, the defendant applied to Burger King's Birmingham, Michigan, district office for a franchise, dealt with this office daily, and ultimately executed a final agreement with Burger King after negotiating with the district office and Burger King's headquarters in Florida. 471 U.S. at 466–67, 467 n.7. The Supreme Court of the United States rejected the Court of Appeals reasoning that given the supervision and involvement of the district office, the defendant reasonably believed that the Michigan office was "the embodiment of Burger King," and "he therefore had no reason to anticipate a Burger King suit outside of Michigan." *Id.* at 480 (cleaned up). Instead, the Supreme Court concluded that there was "substantial record evidence indicating that [the defendant] most certainly knew that he was affiliating himself with an enterprise based primarily in Florida," *id.* at 480, and determined that the assertion of personal jurisdiction over the defendant in Florida "did not offend due process," *id.* at 478.

¶ 21 In this matter, it is undisputed that Smart & Final solicited Toshiba agents outside of North Carolina and knew at the time that Toshiba was based in North Carolina. Like the Supreme Court of the United States, we therefore cannot dismiss Smart & Final's solicitation of Toshiba as irrelevant. Knowingly soliciting an entity based in North Carolina for a multiyear contractual relationship is relevant to whether a contract has a substantial connection with North Carolina. *See Mucha v. Wagner*, 378 N.C. 167, 2021-NCSC-82, ¶ 11 ("In prior cases where this Court has found a defendant's one-time contacts sufficient to create specific personal jurisdiction in North Carolina, the defendant knew or reasonably should have known that by undertaking some action, the defendant was establishing a connection with the State of North Carolina.").

¶ 22 Also, nothing in *McGee*, *Burger King*, or this Court's decision applying *Burger King* in *Tom Togs, Inc. v. Ben Elias Industries Corp.*, 318 N.C. 361 (1986), suggests that unless the location of the act is dictated by the contract, performance of a contractual obligation in the forum state is an irrelevant unilateral act. In *McGee*, the Supreme Court of the United States in its analysis identified three facts supporting its determination that the suit involved a contract with a substantial connection to the forum. 355 U.S. at 223. One fact was that "the premiums were mailed from [the forum state]." *Id.* In assessing the personal jurisdiction of the forum state concerning a breach of a life insurance contract, *McGee*

did not mention that the contract required the insured to mail premium payments *from* the forum state. Thus, *McGee* lends no support to defendant's contention that the contract must require performance in the forum state. Instead, *McGee* supports the notion that regular contractual performance of a contractual obligation, like premium payments, in the forum is relevant even if the location of the performance is not dictated by the contract.

¶ 23 In *Burger King*, the Supreme Court of the United States, when assessing whether there was record evidence to support that the defendant knew he was affiliating with an entity from the forum state, recognized that the contract documents did "*emphasize* that Burger King's operations are conducted and supervised from the [forum state] headquarters." 471 U.S. at 480 (emphasis added). However, the contract in *Burger King* did not require Burger King to conduct operations from and supervise from its headquarters in the forum state. *See id.* at 488 (Stevens, J., dissenting) (identifying that the contract "required no performance in the state of Florida" and held the district office "responsible for providing all of the services due [defendant]"). Similarly, in *Tom Togs*, the nonresident defendant was "aware that the contract was going to be substantially performed in [the forum state]," but the Court's opinion never indicates that performance was required to be in the forum state. 318 N.C. at 367.

¶ 24 Finally, Smart & Final's view of the Services Agreement's connection to North Carolina is contrary to the unchallenged findings of fact as analyzed previously. This Court has recognized that "[a]lthough a contractual relationship between a North Carolina resident and an out-of-state party alone does not *automatically* establish the necessary minimum contacts with this State, nevertheless, a single contract may be a sufficient basis for the exercise of in personam jurisdiction if it has a substantial connection with this State." *Tom Togs*, 318 N.C. at 367 (second emphasis omitted). Here, the Services Agreement does have a substantial connection with North Carolina, and Smart & Final has not argued that it would be unreasonable or inconvenient for the courts of this State to exercise jurisdiction. Therefore, we hold that the trial court did not err by denying Smart & Final's motion to dismiss for lack of personal jurisdiction.

III. Conclusion

¶ 25 The Due Process Clause does not foreclose the exercise of personal jurisdiction over Smart & Final by the courts of this State on Toshiba's breach of contract and related claims because the contract at issue has

a substantial connection with this State. Smart & Final has "certain minimum contacts with [this State] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316 (cleaned up). Accordingly, we affirm the decision of the trial court.

AFFIRMED.

HOKE COUNTY BOARD OF EDUCATION; ET AL., PLAINTIFFS	)	From N.C. Court of Appeals 22-86
AND	)	From Wake 95CVS1158
CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, PLAINTIFF-INTERVENOR	)	
AND	)	
RAFAEL PENN, ET AL., PLAINTIFF- INTERVENORS	)	
v.	)	
STATE OF NORTH CAROLINA AND THE STATE BOARD OF EDUCATION, DEFENDANTS	)	
AND	)	
CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, REALIGNED DEFENDANT	)	

No. 425A21-2

ORDER

The Defendant State of North Carolina's Motion to Suspend Appellate Rules to Expedite Decision in the Public Interest and Motion to Supplement Issues to be Briefed, Plaintiffs' Notice of Appeal, Plaintiff-Intervenors' (Rafael Penn, et al.) Notice of Appeal, Defendant State of North Carolina's Notice of Appeal, and the Legislative-Intervenors' Notice of Appeal are decided as follows: This case is before the Court on the basis of the special order entered by the Court in this case on 18 March 2022 allowing Defendant State of North Carolina's Petition for Discretionary Review Prior to Determination by the Court of Appeals and Plaintiff's Petition for Discretionary Review Prior to Determination by the Court of Appeals, with Plaintiff's Notice of Appeal Based Upon a Dissent, Plaintiff's Notice of Appeal Based Upon a Constitutional Question, Plaintiff's Petition for Discretionary Review Under N.C.G.S. § 7A-31, Plaintiff's Petition in the Alternative for Writ of Certiorari to Review Order of N.C. Court of Appeals, Plaintiff-Intervenors' (Rafael Penn, et al.) Notice of Appeal Based Upon a

Dissent, Plaintiff-Intervenors' (Rafael Penn, et al.) Notice of Appeal Based Upon a Constitutional Question, Plaintiff-Intervenors' (Rafael Penn, et al.) Petition for Discretionary Review Under N.C.G.S. § 7A-31, Plaintiff-Intervenors' (Rafael Penn, et al.) Petition for Writ of Certiorari to Review Order of N.C. Court of Appeals, Controller's Motion to Dismiss Appeals, Controller's Conditional Petition for Writ of Supersedeas, and Legislative-Intervenors' Motion to Dismiss Appeals filed in No. 425A21-1 having been held in abeyance by means of a special order entered by the Court in that case on 18 March 2022. The requests for authorization to brief and argue additional issues relating to the order entered by Judge Michael L. Robinson in Superior Court, Wake County, on 26 April 2022 filed by Plaintiffs; Plaintiff-Intervenors (Rafael Penn, et al.); and Defendant State of North Carolina are allowed. The parties shall, to the extent that they have not already done so, file the record on appeal by no later than 1 June 2022 or such other time as the Court may, upon motion by any party, establish; that any party's appellant brief shall be filed on or before 1 July 2022; that any party's appellee brief shall be filed on or before 1 August 2022; and that any party's reply brief shall be filed on or before 12 August 2022. This case shall be scheduled for oral argument on a date to be determined during the week of 29 August 2022, with an opinion to be filed upon a date to be chosen in the Court's discretion.

By order of the Court in Conference, this the 31st day of May 2022.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of June 2022.

s/Grant E. Buckner
Grant E. Buckner
Clerk of the Supreme Court

IN RE ADOPTION OF C.H.M.

[381 N.C. 708 (2022)]

IN THE MATTER OF THE ADOPTION OF	)	From N.C. Court of Appeals 15-1057; 19-558; 21-196
C.H.M., A MINOR CHILD	)	From Wake 13SP2914

No. 297PA16-3

ORDER

Having considered respondent's request for other and further relief as this Court deems appropriate based on respondent's motion, this Court declares that respondent shall file and serve a new brief within thirty days after entry of this order.

By order of the Court in Conference, this the 15th day of June 2022.

s/ Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 17th day of June 2022.

s/Grant E. Buckner
Grant E. Buckner
Clerk of the Supreme Court

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

17 JUNE 2022

1P22-2	State v. Quinton Lajuan Duncan	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **06/14/2022**
16P22-2	Lawyers Andrew Locke Clifford, Daniel Allen Harris, and Locke Turner Clifford v. Iman Fadulalla Khidr	Def's Pro Se Motion for PDR	Dismissed
30P22	David Russell Roberson v. Trupoint Bank	Plt's PDR Under N.C.G.S. § 7A-31 (COA21-221)	Denied
34A21	State v. William Brandon Coffey	Def's Motion to Remove Case from Calendar of Oral Arguments	Dismissed as moot **05/05/2022**
59P22	State v. Tyrone Javelle Bowens	1. Def's PDR Under N.C.G.S. § 7A-31 (COA20-796) 2. Def's Petition in the Alternative for Writ of Certiorari to Review Decision of the COA	1. Denied 2. Denied
68P22	Erin Jenkins, Employee v. Wells Fargo Bank, NA, Employer, Old Republic Insurance Company, Carrier (Sedgwick Claims Management Services, Inc., Third-Party Administrator)	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA21-336) 2. Defs' Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
69A22	Miller v. LG Chem, Ltd., et al.	1. Def's (LG Chem, Ltd.) Motion to Unseal Affidavit of Joon Young Shin Dated March 31, 2020 2. Plt's Motion to File Brief Under Seal	1. Allowed **05/19/2022** 2. Dismissed as moot **05/20/2022**
75P22	Dennis David Bossian v. Andrew Paul Chica, Kimberly Ann Bossian	Plt's PDR Under N.C.G.S. § 7A-31 (COA21-381)	Denied
78P09-2	State v. Lester Hardy	Def's Pro Se Motion for Case Review	Dismissed
102P19-3	State v. Christopher Lee Neal	Petitioner's Pro Se Petition for Writ of Habeas Corpus	Denied **05/26/2022**

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106P11-2	State v. Kenneth D. Hammonds	Def's Pro Se Motion for Petition in the Nature of a Motion to Bypass the COA	Dismissed
108P22	Mary Sue Vaitovas v. City of Greenville; Pitt County Board of Education; Phil Berger, in his capacity as President Pro Tempore of the Senate; and Tim Moore, in his capacity as Speaker of the House of Representatives	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA20-889) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Defs' (City of Greenville and Pitt County Board of Education) Motion to Dismiss Appeal 4. Legislative Defs' Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed 4. Allowed
111P22	State v. Derrick Lee Odom	1. Def's Pro Se Motion to Move Trial to Another County 2. Def's Pro Se Motion to Reduce Bond	1. Dismissed 2. Dismissed
117P22	State v. Tracy R. Caldwell	Def's Pro Se Motion for Court Date to Fire Public Defender and for a Bond Motion	Dismissed
127P22	State v. Jeffery Ray Acker	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA21-512)	Denied
130P22-3	Travis Wayne Baxter v. State of N.C., Roy Cooper, III, Daniel P. O'Brien, Greensboro PD, Guilford County Sheriff	Plt's Pro Se Motion for Immediate Release Due to No Probable Cause	Denied **05/06/2022**
130P22-4	State v. Travis Baxter	Def's Pro Se Motion for Court to Acknowledge Prejudice	Denied **05/20/2022**
130P22-5	Travis Wayne Baxter v. State of N.C., Roy Cooper, III, Daniel P. O'Brien, Greensboro PD, Guilford County Sheriff	Plt's Pro Se Motion to Make a Deal	Denied **06/06/2022**
133P22	In the Matter of Paula Glenn	Petitioner's Pro Se Motion for Appeal	Dismissed
135P22	In the Matter of Jacqualyn Lanier	1. Petitioner's Pro Se Motion for Emergency Relief 2. Petitioner's Pro Se Motion for Guardian	1. Dismissed **05/06/2022** 2. Dismissed **05/06/2022**

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136P22	State v. Wendy Dawn Lamb Hicks	1. State's Motion for Temporary Stay (COA20-665) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/09/2022** 2. Allowed 3. Allowed
137P22	Canady v. N.C. Department of Public Safety	1. Plt's Pro Se Petition for Writ of Mandamus 2. Plt's Pro Se Petition for Writ of Mandamus	1. Denied **06/15/2022** 2. Denied **06/15/2022**
139P22	State v. Michael Kennedy	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **05/10/2022**
142P22	State v. Kelton Buck Lewis	Def's PDR Under N.C.G.S. § 7A-31 (COA20-912)	Denied
145P22	State v. Rochein Fuquan Jordan	1. Def's Motion for Temporary Stay (COA21-469) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/11/2022** 2. 3.
149P14-2	State v. Tiffany Leigh Marion	1. Def's PDR Under N.C.G.S. § 7A-31 (COA20-729) 2. Def's Motion to Amend PDR Under N.C.G.S. § 7A-31	1. Denied 2. Denied **Ervin, J., recused**
149P22	State v. Michael Leon Powell	Def's PDR Under N.C.G.S. § 7A-31 (COA20-824)	Denied
150P22	Charles Perkins and Nancy Perkins v. Jordan Bryant	Def's Pro Se Motion for Appeal for Mediation	Dismissed
151P22	State v. Trequan Jerome Alston	Def's Pro Se Motion to Review the Case	Dismissed
153P22	State v. Charven Keivon Gorham	Def's Pro Se Motion to Remove Attorney and Appoint New Counsel	Dismissed
154P22	In the Matter of J.A.D.	1. Def's Motion for Temporary Stay (COA21-228) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/19/2022** 2. 3.

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155P22	State v. Travis Lamont Davenport	1. State's Motion for Temporary Stay (COA20-628) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **05/20/2022** 2. 3. 4.
157P22	State v. Tevin Demetrius Vann	1. State's Motion for Temporary Stay (COA20-907) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/20/2022** 2. 3.
163P22	Kean v. Kean	1. Def's PDR Under N.C.G.S. § 7A-31 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31 3. Def's Motion for Temporary Stay 4. Def's Petition for Writ of Supersedeas	1. 2. 3. Allowed **06/07/2022** 4.
164P22	State of North Carolina v. Todd Emerson Collins, Jr.	1. Def's Pro Se Motion for Temporary Stay (COA21-404) 2. Def's Pro Se Petition for Writ of Supersedeas 3. Def's Pro Se PDR Under N.C.G.S. § 7A-31	1. Denied **05/26/2022** 2. 3.
173P22	Kluttz-Ellison v. Noah's Playloft Preschool, et al.	1. Defs' Motion for Temporary Stay (COA21-356) 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed **06/08/2022** 2. 3.
200P07-10	In re Robinson	Petitioner's Pro Se Motion for Notice of Appeal	Denied **06/10/2022**
200P21	In the Matter of J.M., N.M.	1. Petitioner and Guardian ad Litem's Motion for Temporary Stay (COA20-677) 2. Petitioner and Guardian ad Litem's Petition for Writ of Supersedeas 3. Petitioner and Guardian ad Litem's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/09/2021** 2. Allowed 3. Allowed
207A21	In the Matter of E.D.H.	Respondent-Mother's Motion to Amend Record on Appeal	Denied **05/22/2022**

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215A21	In the Matter of M.S.L. a/k/a M.S.H.	Respondent-Father's Petition for Rehearing	Denied **05/16/2022**
228A21	C Investments 2, LLC v. Arlene P. Auger, Herbert W. Auger, Eric E. Craig, Gina Craig, Laura Dupuy, Stephen Ezzo, Janice Huff Ezzo, Anne Carr Gilman Wood, as Trustee of the Francis Davidson Gilman, III Trust f/b/o Pets U/W Dated June 20, 2007, Lauren Heaney, Bridget Holdings, LLC, Ginner Hudson, Jack Hudson, Chad Julka, Sabrina Julka, Arthur Maki, Ruth Maki, Jennie Raubacher, Matthew Raubacher, as Co-Trustees of the Raubacher/Cheung Family Trust Dated November 11, 2018, Lawrence Tillman, Linda Tillman, Ashfaq Uraizee, Jabeen Uraizee, Jeffrey Stegall, and Valerie Stegall	1. Defs' (Jennie Raubacher, et al.) Motion in the Alternative to Consider Brief as Amicus Curiae Brief (COA19-976) 2. Defs' (Jennie Raubacher, et al.) Petition for Writ of Certiorari to Review Decision of the COA 3. Plt's Motion for Substitution of Parties 4. Defs' (Jennie Raubacher, et al.) Motion to Strike 5. Bellows, et al.'s Motion for Leave to File Amicus Brief	1. Denied **05/04/2022** 2. Denied **05/04/2022** 3. Allowed **05/05/2022** 4. Dismissed as moot **05/04/2022** 5. Allowed **05/11/2022**
242P21-2	State v. Danny William Young	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **05/25/2022**
276A21	State v. Michael Steven Elder	State's Motion to Continue Oral Argument (COA20-215)	Allowed **05/23/2022**
283P21-7	American Transportation Group Insurance Risk Retention Group v. MVT Insurance Services, Inc., Amrit Singh, Eleazar Rojas, and Shamsher Singh	Def's (Amrit Singh) Motion to Dismiss the Case	Dismissed as moot

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290P16-3	Michael Eugene Hunt v. North Carolina Department of Public Safety Secretary, Mr. Eddie Buffaloe, Jr., and Mrs. Mary Locklear, Warden of Lumberton Correctional Institution	Petitioner's Pro Se Motion for PDR (COAP22-166)	Denied **05/13/2022**
290P16-4	Michael Eugene Hunt v. State of North Carolina, Governor Roy Cooper, Secretary of North Carolina Department of Adult and Juvenile Correction, Mr. Eddie M. Buffaloe, Jr., Commissioner of North Carolina Department of Adult and Juvenile Correction, Mr. Todd Ishee, and Warden Stephen Jacobs, at Scotland Correctional Institution.	Petitioner's Pro Se Petition for Writ Of Habeas Corpus	Denied **05/27/2022**
294A21	State v. Harold Eugene Swindell	Def's Motion to Continue Scheduled Oral Argument	Dismissed as moot **05/16/2022**
297PA16-3	In the Matter of the Adoption of C.H.M., a minor child	1. Petitioners' Motion for Temporary Stay (COA15-1057) 2. Petitioners' Petition for Writ of Supersedeas 3. Respondent-Father's Motion to File Under Seal 4. Respondent-Father's Motion to Take Judicial Notice 5. Respondent-Father's Motion for Extension of Time to File Response to Petition for Writ of Supersedeas 6. Petitioners' Motion to Take Judicial Notice 7. Respondent-Father's Notice of Appeal Based Upon a Dissent	1. Allowed **07/07/2021** 2. 3. Allowed **07/09/2021** 4. Allowed **07/09/2021** 5. Allowed **07/19/2021** 6. 7. ---

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		8. Respondent-Father's Amended Notice of Appeal Based Upon a Dissent	8. ---
		9. Respondent-Father's Notice of Appeal in the Alternative Based Upon a Constitutional Question	9.
		10. Respondent-Father's Petition in the Alternative for Discretionary Review Under N.C.G.S. § 7A-31	10. Denied
		11. Respondent-Father's Motion to Clarify Briefing Timeline	11. Special Order **06/15/2022**
317P19-2	In re Entzminger	1. Respondent's Motion for Temporary Stay (COA21-525)	1. Allowed **06/07/2022**
		2. Respondent's Petition for Writ of Supersedeas	2.
319P21	James M. Ellis, Administrator of the Estate of Johnnie Edward Harper v. Kim Harper, Pat Doe 1, Rochelle Greenidge, Pat Doe 2, Beth Rodriguez, Pat Doe 3, Sonya Thomas, Pat Doe 4, Redwolf Contracting Service LLC, and Michael Svencicki, Lien Claimants	1. Respondent's (Kim Harper) Pro Se Notice of Appeal Based Upon a Constitutional Question (COA20-730)	1. Dismissed *ex mero motu*
		2. Respondent's (Kim Harper) Pro Se PDR Under N.C.G.S. § 7A-31	2. Denied
		3. Respondent's (Kim Harper) Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Buncombe County	3. Dismissed as moot
		4. Respondent's (Kim Harper) Pro Se Motion to Disregard and Replace Filing	4. Allowed
		5. Respondent's (Kim Harper) Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Buncombe County	5. Dismissed
		6. Respondent's (Kim Harper) Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Buncombe County	6. Dismissed as moot
		7. Respondent's (Kim Harper) Pro Se PDR Under N.C.G.S. § 7A-31	7. Dismissed as moot
		8. Respondent's (Kim Harper) Pro Se Petition for Writ of Certiorari to Review Order of the COA	8. Dismissed as moot
		9. Respondent's (Kim Harper) Pro Se Petition for Writ of Certiorari to Review Order of the COA	9. Dismissed
		10. Respondent's (Kim Harper) Pro Se Motion to Disregard and Replace Filing	10. Allowed

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321P21	David Schaeffer v. Singlecare Holdings, LLC, Singlecare Services, LLC, RxSense Holdings, LLC, Richard A. Bates, and Darcey Schoenebeck	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA20-427) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Defs' Motion to Dismiss Appeal 4. Defs' Motion to Admit Charles B. Leuin Pro Hac Vice	1. --- 2. Allowed 3. Allowed 4. Allowed
327P21-2	Chaplain Dr. Ned Burgess, Jr. v. Joy Natasha Faucette (a/k/a Balom) (formerly Burgess), Timothy Lorenzo Balom, Tyrone Faucette, Cherry E. Faucette, Audrey D. Faucette	1. Plt's Pro Se Motion for Amended Notice of Appeal 2. Plt's Pro Se Motion for Expedited Appeal 3. Plt's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Dismissed as moot 3. Allowed
331PA21	Community Success Initiative v. Moore	1. Plts' Motion to Admit R. Stanton Jones Pro Hac Vice 2. Plts' Amended Motion to Admit R. Stanton Jones Pro Hac Vice 3. Plts' Motion to Admit Elisabeth S. Theodore Pro Hac Vice 4. Plts' Motion to Admit Farbod K. Faraji Pro Hac Vice	1. Dismissed as moot **06/08/2022** 2. Allowed **06/07/2022** 3. 4. Allowed **06/07/2022**
358A16-2	In re Southeastern Eye Center	Def's Pro Se Motion for Consolidation of Two Appeals Each Appealing Three Related Orders	Denied
370P21	Redwolf Contracting Svc., LLC and Michael Svencicki v. Kim Harper	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP21-357) 2. Def's Pro Se Motion for Notice of Appeal Based on a Constitutional Question 3. Def's Pro Se Motion for Notice of Appeal Based on a Constitutional Question 4. Def's Motion to Disregard and Replace Filing 5. Def's Pro Se Motion to Amend Petition for Writ of Certiorari 6. Def's Pro Se Amended Petition for Writ of Certiorari to Review Order of the COA 7. Def's Pro Se Motion to Include Exhibit(s) to the Record	1. Dismissed as moot 2. Dismissed as moot 3. Dismissed *ex mero motu* 4. Allowed 5. Allowed 6. Dismissed 7. Allowed

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374P21	Fred Cohen, Executor of the Estate of Dennis Alan O'Neal, Deceased, and Fred Cohen, Executor of the Estate of Debra Dee O'Neal, Deceased v. Continental Motors, Inc. (f/k/a Teledyne Continental Motors, Inc. and/or Teledyne Continental Motors); and Aircraft Accessories of Oklahoma, Inc.	Plt's Motion to Admit Michael S. Miska Pro Hac Vice	Dismissed **05/16/2022**
377P20-4	State v. Andrew Ellis	Def's Pro Se Motion to Review Cases	Dismissed
394PA21	Michael Mole' v. City of Durham, North Carolina, a Municipality	National Fraternal Order of Police and the State of North Carolina Fraternal Order of Police's Motion to Admit Larry H. James Pro Hac Vice (COA19-683)	Allowed **05/19/2022**
400P21-3	Frederick Wilson v. Ken Osadnick, et al.	1. Plt's Pro Se Motion for Restraining Order 2. Plt's Pro Se Motion to Proceed *In Forma Pauperis* 3. Plt's Pro Se Motion for All Star Program 4. Plt's Pro Se Motion for Care Plan 5. Plt's Pro Se Motion for Prosecution 6. Plt's Pro Se Motion for Drivers License Renewal 7. Plt's Pro Se Motion for Court Ordered Lawyer/Public Defender 8. Plt's Pro Se Motion for Justification of Rights and Fair Case Involvement 9. Plt's Pro Se Motion for Summary Judgment 10. Plt's Pro Se Motion for Juvenile Petition 11. Plt's Pro Se Motion for Juvenile Petition	1. Dismissed 2. Allowed 3. Dismissed 4. Dismissed 5. Dismissed 6. Dismissed 7. Dismissed 8. Dismissed 9. Dismissed 10. Dismissed 11. Dismissed

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425A21-2	Hoke County Board of Education, et al. v. State of NC, et al.	1. Plt-Intervenors' (Rafael Penn, et al.) Amended Motion to Admit David Hinojosa Pro Hac Vice (COA22-86) 2. Plt-Intervenors' (Rafael Penn, et al.) Motion to Admit Michael Robotti Pro Hac Vice 3. State's Motion to Suspend Appellate Rules to Expedite Decision in the Public Interest 4. State's Motion to Supplement Issues to be Briefed	1. Allowed **05/18/2022** 2. Allowed **05/19/2022** 3. Special Order **05/31/2022** 4. Special Order **05/31/2022**
431P21	State v. Shawn D. Sturdivant	Def's PDR Under N.C.G.S. § 7A-31 (COA20-444)	Denied
486PA19-2	State v. Jamell Cha Melvin and Javeal Aaron Baker	Def's (Jamell Cha Melvin) PDR Under N.C.G.S. § 7A-31 (COA18-843-2)	Denied
531P20-3	State v. Connell Dixon Hawkins, Chadley Tyrone Norris, James Alexander Ray	1. Def's (Connell Dixon Hawkins) Pro Se PDR Under N.C.G.S. § 7A-31 (COA20-881) 2. Def's (Connell Dixon Hawkins) Pro Se Motion to Proceed *In Forma Pauperis*	1. Denied 2. Allowed

IN RE A.M.C.

[381 N.C. 719, 2022-NCSC-82]

IN THE MATTER OF A.M.C. AND N.A.G.

No. 341A21

Filed 15 July 2022

Termination of Parental Rights—motion for continuance—more time for counsel to prepare—effective assistance of counsel—argument waived on appeal

The trial court did not err by denying respondent-mother's motion to continue a termination of parental rights hearing where her counsel told the court he needed more time to prepare a defense (respondent-mother had recently been incarcerated and would potentially be starting a 120-day substance abuse treatment program). Because counsel did not assert that the continuance was necessary to protect respondent-mother's constitutional right to effective assistance of counsel, the denial of the motion was reviewable for an abuse of discretion only; here, there was no abuse of discretion where respondent-mother failed to show any "extraordinary circumstances" to justify the continuance, which would have pushed the hearing beyond the ninety-day period prescribed by N.C.G.S. § 7B-1109(d). Moreover, there was no factual basis for respondent-mother's argument that her counsel's performance at the termination hearing was constitutionally deficient.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 27 May 2021 by Judge Kimberly Gasperson-Justice in District Court, Henderson County. This matter was calendared in the Supreme Court on 1 July 2022 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Susan F. Davis, Assistant County Attorney, for petitioner-appellee Henderson County Department of Social Services.

Alston & Byrd LLP, by Kelsey L. Kingsbery, for appellee Guardian ad Litem.

Freedman Thompson Witt Ceberio & Byrd PLLC, by Christopher M. Watford, for respondent-appellant mother.

EARLS, Justice.

IN RE A.M.C.

[381 N.C. 719, 2022-NCSC-82]

¶ 1 Respondent-mother appeals from the trial court's order terminating her parental rights in her minor children "Ava" and "Noah."[1] The sole basis for the appeal is the trial court's denial of her counsel's motion for a continuance of the termination hearing. The record demonstrates that this motion was not based on the potential denial of a constitutional right; therefore, an abuse of discretion standard applies. We conclude that the trial court did not abuse its discretion in denying the motion to continue, and we affirm the trial court's order terminating respondent's parental rights in Ava and Noah.

I. Background

¶ 2 On 21 June 2019, the Henderson County Department of Social Services (DSS) filed a juvenile petition alleging that Ava and Noah were neglected and dependent juveniles. The petition stated that law enforcement had executed a search warrant that morning at respondent's home, where they discovered intravenous needles, some filled with a "brownish clear liquid," and a pipe, all within easy reach of the children. Law enforcement contacted DSS after discovering Ava and Noah in the home and arrested respondent and her boyfriend on charges related to methamphetamines. Respondent told a social worker she was using methamphetamines and had been doing so for at least a year, but she refused to sign a safety plan or participate in services with DSS and was unable to identify a potential placement for the children. Based on the allegations in the petition and lack of an appropriate caretaker, DSS sought and obtained nonsecure custody of the children the same day.

¶ 3 After a hearing on 10 October 2019, the trial court entered an order adjudicating Ava and Noah to be neglected and dependent juveniles. The adjudication was based on the allegations in the juvenile petition as well as the children's subsequent forensic medical examinations, which revealed further evidence regarding how respondent's drug use was affecting the children and evidence of the children's exposure to domestic violence. Noah's hair follicle test returned positive for methamphetamine, amphetamine, and cocaine. In the contemporaneous disposition order, the court ordered respondent to satisfy several requirements to achieve reunification with the children, including completing assessments related to substance abuse and domestic violence and following the resulting recommendations, submitting to random drug screens, obtaining a stable income and maintaining appropriate housing, visiting

1. Pseudonyms are used to protect the identity of the minor children and for ease of reading.

with the children, and keeping in contact with DSS. The children were placed in their aunt's care.

¶ 4 In the order entered following the first review and permanency-planning hearing held on 13 February 2020, the trial court found respondent had made some progress towards completing the requirements for reunification. Respondent had obtained a substance abuse assessment, which recommended individual and family therapy and ninety hours in a substance abuse intensive outpatient treatment program (SAIOP), and had begun individual therapy. The court had established a child support requirement of $50.00 a month. Moreover, the court found that respondent had visited with the children, maintained contact with DSS, and obtained appropriate housing. Nonetheless, the court found respondent's progress to be inadequate based upon her multiple positive drug screens, as well as her failures to obtain a domestic violence assessment, complete a parenting class, obtain employment or a stable and sufficient income, or complete substance abuse treatment.[2] The court set a primary plan of reunification and a secondary plan of guardianship with an appropriate caretaker and allowed respondent a minimum of one hour of supervised visitation per week.

¶ 5 After several continuances, the matter came on for a review and permanency planning hearing on 10 December 2020. The court again found respondent's progress towards completing the requirements for reunification insufficient to remedy the conditions which led to the children's removal. Respondent had either failed to submit to requested drug screens or tested positive; failed to complete substance abuse treatment; failed to complete a domestic violence assessment, despite evidence of continued domestic violence between respondent and her boyfriend; failed to complete parenting classes; failed to pay child support, having accrued a $250.00 arrearage; and failed to obtain employment or a stable income. The court changed the primary plan to adoption and maintained a secondary plan of guardianship with an appropriate caretaker. The trial court found that the children were negatively affected by visitation with respondent, especially Noah, who "reacted very disrespectfully towards his aunt" afterward. The court thus suspended respondent's visitation.

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2. Respondent began SAIOP in August 2019, but due to "a decline in her participation and attendance and positive drug screens," her recommended treatment was changed to inpatient treatment. She arrived at the inpatient facility on 31 December 2019, but she was asked to leave less than two weeks later on 12 January 2020 and was unable to complete the program.

¶ 6 On 25 January 2021, DSS filed a motion to terminate respondent's parental rights in Ava and Noah based on neglect and failure to make reasonable progress. N.C.G.S. § 7B-1111(a)(1)–(2) (2021). The termination hearing was first scheduled for 8 April 2021, but it was continued to 16 April 2021 "due to the number of cases scheduled for hearing and the lack of available court time." At the beginning of the hearing, respondent's counsel requested a continuance, but the trial court denied the motion. In the termination order entered on 27 May 2021, the court determined that grounds existed to terminate respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1) and (2) and concluded that termination of respondent's parental rights was in Ava's and Noah's best interests.[3]

II. Analysis

¶ 7 Respondent's sole argument on appeal is that the trial court violated her constitutional right to effective assistance of counsel when the court denied her counsel's motion for a continuance. Respondent argues that her counsel "was not provided with an opportunity to appropriately prepare" a defense for the termination hearing. She asserts this purported violation of her rights created a presumption of prejudice because there is no evidence she was the cause of the delay in her counsel's preparation.

¶ 8 "Ordinarily, a motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review." *In re A.L.S.*, 374 N.C. 515, 516–17 (2020) (quoting *State v. Walls*, 342 N.C. 1, 24 (1995)). If the motion is based on a constitutional right, "the motion presents a question of law and the order of the court is reviewable." *Id.* at 517 (quoting *State v. Baldwin*, 276 N.C. 690, 698 (1970)). "However, when '[the respondent] did not assert in the trial court that a continuance was necessary to protect a constitutional right,' this Court does not review the trial court's denial of a motion to continue on constitutional grounds." *In re D.J.*, 378 N.C. 565, 2021-NCSC-105, ¶11 (alteration in original) (quoting *In re A.L.S.*, 374 N.C. at 517). A motion to continue based upon trial counsel's request for more time to prepare does not equate to such an assertion. *See In re A.J.P.*, 375 N.C. 516, 522–24 (2020) (reviewing a denial of a motion to continue for abuse of discretion where trial counsel asserted he needed "more time for preparation" after allegedly receiving an underlying order only days before the termination hearing); *In re S.M.*, 375

3. The order also terminated the rights of Ava and Noah's father, but he is not a party to this appeal.

N.C. 673, 678–79 (2020) (reviewing a denial of a motion to continue for abuse of discretion when trial counsel asserted he needed more time to prepare a defense for, or subpoena witnesses related to, a psychosexual evaluation of his client that he received the day before the hearing).

¶ 9 Here, respondent's counsel did not assert in the trial court that a continuance was necessary to protect a constitutional right. Instead, he stated: "My reasoning behind the continuance. Last week was certainly [respondent's] more recent incarceration. And they did not provide me an opportunity to really prepare [respondent] for today's defense . . . ." Counsel also discussed the imminent possibility of respondent beginning a 120-day inpatient substance abuse treatment program. But these reasons do not amount to the assertion of a constitutional right. Thus, respondent has waived any argument that the denial of the motion to continue was based on a legal issue implicating her constitutional rights, and we review the court's ruling on the motion to continue for abuse of discretion. *In re A.J.P.*, 375 N.C. at 523.

¶ 10 "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* (quoting *State v. Hennis*, 323 N.C. 279, 285 (1988)).

> In reviewing for an abuse of discretion, we are guided by the Juvenile Code, which provides that continuances that extend beyond 90 days after the initial petition shall be granted only in extraordinary circumstances when necessary for the proper administration of justice. Furthermore, continuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it. The chief consideration is whether granting or denying a continuance will further substantial justice.

In re J.E., 377 N.C. 285, 2021-NCSC-47, ¶15 (cleaned up). In this case those factors show that the trial court's ruling was reasonable and not arbitrary.

¶ 11 The termination hearing was held on 16 April 2021, eighty-one days after DSS filed the motion to terminate respondent's parental rights. Based on counsel's request for more time to prepare, and his reference to respondent's intention to enter a 120-day treatment facility—the application for which was "still pending" at the time of the termination hearing—it appears a continuance would have pushed the hearing beyond the ninety-day period prescribed by N.C.G.S. § 7B-1109(d). Thus,

respondent was required to show "extraordinary circumstances" to justify a continuance. *See* N.C.G.S. § 7B-1109(d) (2021). We conclude that she failed to make such a showing.

¶ 12 Respondent places great emphasis on a purported "third-party involvement or interference," which allegedly prevented her counsel from preparing for the hearing. At the termination hearing, a DSS social worker testified that law enforcement found drugs during a raid of respondent's home on 12 March 2021. As a result, respondent was arrested and jailed at the Henderson County Detention Center. In requesting a continuance, as noted above, counsel for respondent merely stated, "Last week was certainly [respondent's] more recent incarceration. And they did not provide me an opportunity to really prepare [respondent] for today's defense . . . ." While respondent concedes trial counsel "never identified the third party[,]" she suggests that "it seems likely that [counsel's] reference may indicate" it was the staff at the detention center who impeded her counsel's ability to prepare for the hearing.

¶ 13 We find such conjecture, without any concrete evidence of direct interference from jail staff, insufficient to support a conclusion that extraordinary circumstances are present in this case. *Cf. In re J.E.*, ¶17 ("Respondent's attempt on appeal to explain his absence by asserting it was 'likely' he did not know the hearing date is not convincing. Respondent never affirmatively asserts he did not have notice of the hearing."). The motion to terminate respondent's parental rights was filed on 25 January 2021, respondent was incarcerated on 12 March 2021, and she remained incarcerated when the termination hearing was held on 16 April 2021. Without more, respondent's incarceration for thirty-five out of eighty-one days between the filing of the motion and the hearing does not create extraordinary circumstances mandating additional time. We conclude that the trial court did not abuse its discretion in denying her motion for a continuance. *See id.* ¶19.

¶ 14 Having concluded that the trial court did not abuse its discretion in denying the motion for a continuance, we do not need to address whether denial of the motion prejudiced respondent; however, respondent also argues that the denial of the continuance motion, whether or not the motion was explicitly premised on the denial of a constitutional right, did, in fact, deprive her of her right to effective assistance of counsel. Respondent also characterizes her attorney's performance as deficient because he failed to present "her side of things" to the trial court. While she concedes that her attorney "made a handful of objections," she asserts that he "offered very little defense" in that he did not present any evidence or witnesses or give a closing argument. Respondent

contends that because her attorney "knew that he was limited in his ability to represent" her, he was unable to present her testimony concerning "her ability to comply with classes and treatment programs, or her lack thereof," her motivations, and her intentions, as well as her "evidence to clarify the bare assertions of the social worker gleaned from hearsay sources."

¶ 15 We note that respondent's counsel was appointed to represent her on 11 July 2019, nearly two years before the termination hearing. He received a copy of the motion to terminate respondent's parental rights on 25 January 2021 and filed an answer to the motion on 24 February 2021. In addition to the "handful of objections" made by her counsel that respondent acknowledged, her counsel cross-examined a witness during adjudication, and it appears from the transcript that neither party was offered or made closing arguments. Respondent makes no effort to indicate what evidence could have been presented, or what facts might have been established, had a continuance been granted and her counsel been afforded more time to prepare for the hearing. Moreover, respondent does not challenge any evidence presented at the hearing or the trial court's findings or conclusions based on that evidence. Therefore, respondent has failed to demonstrate ineffective assistance of counsel and has failed to establish grounds to reverse the termination order or to receive a new termination hearing.

III. Conclusion

¶ 16 Accordingly, we conclude that the trial court did not abuse its discretion in denying respondent's motion for a continuance and that there is no factual basis for the assertion that counsel's performance at the termination hearing was constitutionally deficient. Because respondent in this appeal did not challenge either the grounds for termination or the determination that termination was in Ava's and Noah's best interests, we affirm the trial court's termination order.

AFFIRMED.

IN RE B.E.

[381 N.C. 726, 2022-NCSC-83]

IN THE MATTER OF B.E., C.E., Q.E., C.E., JR.

No. 137A21

Filed 15 July 2022

1. Termination of Parental Rights—motion to continue—denial—incarcerated parent—due process argument waived—no extraordinary circumstances

A father's argument on appeal that the denial of his fourth motion to continue a termination of parental rights (TPR) hearing violated his due process rights was waived because his counsel did not raise the constitutional issue before the trial court. There was no abuse of discretion where the father had already been granted three continuances to allow more time to secure his participation by telephone from federal prison, there was no showing that another continuance would increase his chances at participation, and more than eight months had passed since the filing of the TPR petition. Therefore, there were no extraordinary circumstances pursuant to N.C.G.S. § 7B-1109(d) to justify another continuance.

2. Termination of Parental Rights—grounds for termination—neglect—likelihood of future neglect—extensive history of drug use and domestic violence

Disregarding one finding of fact that was not supported by record evidence (regarding a father's participation in substance abuse and parenting education classes while incarcerated), the trial court's termination of a father's parental rights to his four children on the ground of neglect was supported by the remaining findings and did not rest solely on the father's incarceration. The findings detailed the father's extensive history of domestic violence with the children's mother and drug dealing, multiple arrests, lack of direct contact with his children in three years, and minimal progress on his case plan. Therefore, the court's conclusion that there was a "very high" likelihood of a repetition of neglect was well supported.

3. Termination of Parental Rights—grounds for termination—neglect—likelihood of future neglect—mental health issues

The trial court properly terminated a mother's parental rights to her three children based on neglect where its findings, supported by evidence, in turn supported the court's conclusion that there was a high likelihood of the repetition of neglect if the children were returned to the mother's care. Although the mother did make some

progress on her mental health issues up to the time of the hearings, she remained unable to parent all of her children simultaneously, she was still prone to making angry outbursts, and she and the children's father were likely to resume their relationship after the completion of his incarceration, despite their extensive history of domestic violence.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) (2019) from an order entered on 16 February 2021 by Judge James Randolph in District Court, Rowan County. This matter was calendared for argument in the Supreme Court on 1 July 2022 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Jane R. Thompson for petitioner-appellee Rowan County Department of Social Services; and Maggie Dickens Blair for appellee Guardian ad Litem.

Christopher M. Watford for respondent-appellant father.

J. Thomas Diepenbrock for respondent-appellant mother.

MORGAN, Justice.

¶ 1 Respondent-father appeals from the trial court's order which terminated respondent-father's parental rights to his four children: B.E. (Brian),[1] a minor child born in November 2016; C.E. (Cyrus), a minor child born in September 2015; Q.E. (Quintessa), a minor child born in December 2014; and C.E. Jr. (Craig), a minor child born in April 2008. Respondent-mother appeals from the same order of the trial court which terminated respondent-mother's parental rights to her children Brian, Cyrus, and Quintessa. Both respondents challenge the grounds for termination found by the trial court. Respondent-father also challenges the trial court's denial of his motion to continue the termination of parental rights hearing. We conclude that respondents' arguments are meritless and affirm the trial court's order which terminated the parental rights of both respondent-father and respondent-mother.

1. We use pseudonyms to protect the juveniles' identities and for ease of reading.

I. Factual and Procedural Background

¶ 2 Petitioner Rowan County Department of Social Services (DSS) became involved with this family in early 2016 after receiving a report that respondent-father had dragged respondent-mother from her bed and stomped on respondent-mother's head and neck while in the presence of two of their children. DSS initiated at-home services, but respondents largely resisted these efforts. When Brian was born in November 2016, he tested positive for the presence of marijuana in his system and weighed only four pounds. Respondent-mother told hospital staff that she was unaware of her pregnancy.

¶ 3 DSS filed a juvenile petition alleging that the four children were neglected and dependent juveniles on 15 December 2016. The petition laid out respondents' significant history of domestic violence, substance abuse, and homelessness, as well as their failure to provide adequate supervision and medical care for their children. DSS also alleged that respondent-mother "refuses to parent her children, indicating that she is 'done' " and that respondent-mother was "overwhelmed with her life and her poor choices and wants [DSS] to take care of her children." Lastly, DSS alleged that respondent-father was "on the run from law enforcement for stealing a golf cart and fighting deputies" and that DSS's attempts to contact respondent-father were unsuccessful. Based on these verified allegations, the trial court granted nonsecure custody of the children to DSS, which in turn placed the children in foster care.

¶ 4 On 2 February 2017, respondents consented to an adjudication of neglect and dependency based on the allegations in the petition, and on 15 March 2017, the trial court entered a written adjudication and disposition order. The trial court kept the children in DSS custody and awarded biweekly supervised visitation to respondent-mother. Respondent-father, who was incarcerated, was ordered by the trial court to participate in any available services while in jail and upon respondent-father's release, to seek services addressing his issues with substance abuse, domestic violence, mental health, anger management, parenting education, stable housing, and employment. The trial court ordered respondent-mother to obtain and maintain adequate housing; obtain and maintain employment; obtain assessments for substance abuse, mental health, anger management, and domestic violence, and comply with any resulting recommendations; obtain a psychiatric evaluation and comply with any recommended medication management; and complete approved parenting classes and show the skills that she learned during her visitation with the children. Both parents were ordered to submit to random drug

screens and to sign any releases which were necessary to allow DSS and the trial court to monitor respondents' progress.

¶ 5 The trial court conducted a review and permanency planning hearing in September 2017. In its resulting order, the trial court found that respondent-mother was diagnosed with histrionic personality disorder, borderline personality disorder, and severe alcohol use disorder. Respondent-mother also tested positive for alcohol in May 2017, and she refused drug screens in July and September 2017. Respondent-mother also was found to have made some progress on her case plan by completing a parenting class, completing a domestic violence assessment, working to obtain housing, and obtaining employment.

¶ 6 As to respondent-father, the trial court found that he had seven pending felony charges, had been terminated from a domestic violence program for excessive absences, had missed four of six individual counseling sessions, and could not verify his employment to DSS. More favorably, respondent-father was determined to have completed twenty substance abuse sessions and submitted two negative drug screens. The trial court thereupon ordered a primary permanent plan of reunification with a secondary plan of custody with a relative or court-approved caretaker.

¶ 7 On 11 October 2017, both respondents were arrested on charges of trafficking heroin and cocaine, possession with intent to sell and deliver marijuana, and maintaining a dwelling for the purpose of drug sales. Respondent-father was also charged with the offense of engaging in a continuing criminal enterprise. Respondent-mother was released on bond on 16 November 2017. Respondent-father remained incarcerated as of the occurrence of the next permanency planning hearing on 25 January 2018.

¶ 8 In its order entered after the 25 January 2018 hearing, the trial court found that respondent-mother was pregnant and due to deliver the baby in April 2018. Respondent-mother tested positive for alcohol on 7 December 2017, and tested negative for alcohol on 14 and 21 December 2017. The trial court also determined that respondent-mother had completed some recommended programs and was attending different types of therapy sessions. Respondent-mother was also working twenty-four hours per week at a job that she obtained through a staffing agency. Respondent-father was not compliant with his case plan, but he regularly sent his children cards and letters. The trial court changed the plan to a primary permanent plan of reunification and a secondary plan of adoption and ordered the case plans to "be 50/50."

¶ 9 The next permanency planning hearing was held in July 2018. In the order which it issued following the hearing, the trial court found that respondents' new child Regina[2] was born on 15 April 2018 and that Regina's meconium tested positive for marijuana. As a result, DSS began in-home family services. Respondent-mother tested positive for alcohol in June and July 2018, she had only attended six of sixteen possible dialectical behavior therapy (DBT) sessions, and respondent-mother's psychological evaluation determined that she lacked sufficient personal or mental health functioning to be found capable of meeting the demands of parenting a child. The trial court also found that respondent-mother was temporarily living with her uncle and that she did not have a safe and stable permanent home.

¶ 10 The trial court found, with regard to respondent-father, that respondent-father pled guilty to one count of possession of a firearm while trafficking drugs under 18 U.S.C. § 924(c) on 15 June 2018, which is an offense that carried a term of imprisonment of five to forty years. Respondent-father's sentencing was scheduled for 28 September 2018. DSS was unaware of any services in which respondent-father was participating while incarcerated, and he continued to send cards and letters to the children. The trial court changed the primary permanent plan to adoption, with a secondary plan of reunification.

¶ 11 On 2 January 2019, DSS filed a petition to terminate the parental rights of both respondent-mother and respondent-father on the ground of neglect and the ground of willfully leaving the children in an out-of-home placement for more than twelve months without making reasonable progress to correct the conditions leading to their removal. *See* N.C.G.S. § 7B-1111(a)(1)–(2) (2021). DSS also alleged dependency as another ground for termination of respondent-father's parental rights. N.C.G.S. § 7B-1111(a)(6) (2021).

¶ 12 After the termination of parental rights petition was filed, the matter was continued three times over the course of May, June, and July 2019 in order to allow time for respondent-father's counsel to arrange the incarcerated respondent-father's telephone attendance at the hearing. At the resulting rescheduled hearing on 5 September 2019, respondent-father's counsel moved to continue the case for a fourth time, as the attorney recounted his unsuccessful efforts to secure respondent-father's telephone presence at the hearing. Counsel represented that he was repeatedly ignored by officials at respondent-father's correctional facility. The trial court denied the fourth motion for a continuance which was made

2. A pseudonym.

by counsel for respondent-father, and the trial court began the termination hearing.

¶ 13 The case was heard over a span of seven dates between September 2019 and September 2020. During this period of time, DSS closed its in-home services case for the juvenile Regina. On 16 February 2021, the trial court entered its termination of parental rights order, in which the trial court determined that the parental rights of both respondent-mother and respondent-father were subject to termination under N.C.G.S. § 7B-1111(a)(1) and (2). The trial court concluded that termination of respondent-father's parental rights to all four of the children was in the juveniles' best interests. As to respondent-mother, the trial court concluded that termination of her parental rights was in the best interests of the juveniles Brian, Cyrus, and Quintessa but not in the best interests of the juvenile Craig. Thus, the trial court terminated respondent-father's parental rights to all four of his children and terminated respondent-mother's parental rights to her children Brian, Cyrus, and Quintessa. Both respondents appealed.

II. Motion to Continue

¶ 14 **[1]** Respondent-father argues that the trial court violated his due process rights when it denied his counsel's motion to continue the termination of parental rights hearing. Respondent-father notes that "as an inmate with the Federal Bureau of Prisons, [he] had no individual control over his ability to participate in such an important matter" and so the trial court's refusal to grant respondent-father a fourth continuance denied him the opportunity to participate in the hearing and therefore rendered the termination proceedings fundamentally unfair.

> Ordinarily, a motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review. However, if a motion to continue is based on a constitutional right, then the motion presents a question of law which is fully reviewable on appeal.

In re J.E., 377 N.C. 285, 2021-NCSC-47, ¶ 12 (extraneity omitted).

¶ 15 Here, the record does not reflect that respondent-father's counsel moved to continue the termination hearing in order to protect respondent-father's constitutional rights. The trial court allowed respondent-father's counsel to offer sworn testimony about counsel's unsuccessful efforts to secure respondent-father's telephonic participation in the hearing. Counsel then made the following presentation

concerning the attorney's view of the pertinent case law regarding the occurrence of the hearing in respondent-father's absence:

> Okay. So Judge Brown, Honorable Brown asked us to just look and see the case law regarding the presence of a parent in a termination of parental rights proceeding, as to whether that was something that would present the paramount problem, or at the very least, a definite appeal holding, bring back down issue. I cannot say that it's favorable to my client, what I had seen in the case law, and I don't know if I want to be heard more on that, but again, I would anticipate I'll probably have to attempt to appeal in this case just because of the situation, but you know, depending on the outcome, but I did not find my client's presence to be an actual bar to proceeding in this case.

Counsel did not argue to the trial court that the continuance which he sought on behalf of respondent-father was necessary to protect respondent-father's right to due process or any other constitutional right. *See id.*, ¶ 14 ("A parent's absence from termination proceedings does not itself amount to a violation of due process."). Consequently, respondent-father has waived any appellate argument that the trial court's denial of his motion to continue violated respondent-father's constitutional rights, and we therefore review this issue only for an abuse of the trial court's discretion. *See id.*

> In reviewing for an abuse of discretion, we are guided by the Juvenile Code, which provides that continuances that extend beyond 90 days after the initial petition shall be granted only in extraordinary circumstances when necessary for the proper administration of justice. N.C.G.S. § 7B-1109(d) (2019). Furthermore, continuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it. The chief consideration is whether granting or denying a continuance will further substantial justice.

Id. ¶ 15 (extraneity omitted).

¶ 16 At the start of the termination of parental rights hearing, counsel for respondent-father testified about counsel's efforts to secure respondent-father's remote participation. In the termination order, the

trial court made the following unchallenged findings of fact consistent with the testimony of respondent-father's counsel:

> 7. Prior to any evidence being received by the court, [respondent-father's counsel] reported to the court that there appeared to be no reasonable way for [respondent-father] to be able to participate in the hearing. [Counsel] made phone calls to the highest levels in the prison, sent written correspondence, called complaint lines to the Federal Prison Bureau, called the warden and the warden's executive assistant, left voicemails, and called [respondent-father]'s prison counselor. [Counsel] communicated early on with [respondent-father] and his counselor regarding court dates; however, [counsel]'s calls and emails to confirm [respondent-father]'s in-person and phone participation have not been answered or returned. [Counsel]'s attempts have gone unanswered; however, he was able to contact [respondent-father] in April 2019 to file an answer on behalf of [respondent-father] to the TPR petition.
>
> 8. [Counsel] received a letter dated July 18, 2019 . . . from [respondent-father] stating his wishes to participate in the hearing; however, [counsel] reports that the prison officials have not been responsive to assist with making [respondent-father] available for hearings.
>
> 9. Prior TPR hearing dates were continued, on May 9, 2019, June 27, 2019, and July 25, 2019, at the request of [respondent-father's counsel] on behalf of [respondent-father] because [counsel] was making efforts to have his client participate in the hearing from federal prison.
>
> 10. [Respondent-father's counsel] made a motion to continue for the presence of [respondent-father], as [respondent-father] requested to participate in the matter. As it stands, [counsel] has no information regarding if it is against [the] federal prison's policy for [respondent-father] to participate or if it is simply that no person at the prison will answer the phone or otherwise cooperate with making him available for the hearing.

Based on these findings, the trial court decided that respondent-father's "motion to continue should be denied since this hearing has been delayed more than one time to allow arrangements to be made for [respondent-father] to participate in the hearing, and delaying the hearing again would not result in a different outcome."

¶ 17 We discern no abuse of discretion in the trial court's decision to deny respondent-father's fourth motion to continue. At the time that the trial court denied the continuance motion at issue, it had been more than eight months since the filing of the termination of parental rights petition—well beyond the ninety-day timeframe prescribed by N.C.G.S. § 7B-1109. The case had already been continued three times on behalf of respondent-father, and despite the extensive efforts by respondent-father's counsel to contact respondent-father's prison facility to secure respondent-father's remote attendance, which had all been accommodated by the trial court, counsel for respondent-father was not making any progress in achieving the parent's telephonic participation in the termination hearing and there was no indication that further delay would improve the chances of respondent-father's remote participation in the hearing. Under these circumstances, respondent-father did not meet his burden of showing that a fourth continuance of the termination hearing would further substantial justice, and thus the trial court properly denied respondent-father's motion to continue. *See In re J.E.*, ¶ 15 (emphasizing that the Juvenile Code discourages continuances, particularly those "that extend beyond 90 days after the initial petition" (citing N.C.G.S. § 7B-1109(d) (2019))).

III. Grounds for Termination

¶ 18 Both respondents argue that the trial court erred in concluding that grounds existed to terminate their respective parental rights. We review a trial court's adjudication that grounds exist to terminate parental rights "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re E.H.P.*, 372 N.C. 388, 392 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111 (1984)). "A trial court's finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding." *In re R.G.L.*, 379 N.C. 452, 2021-NCSC-155, ¶ 12 (quoting *In re B.O.A.*, 372 N.C. 372, 379 (2019)). "Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407 (2019) (citing *Koufman v. Koufman*, 330 N.C. 93, 97 (1991)). "Moreover, we review only those findings necessary to support the trial court's determination that grounds existed

to terminate respondent's parental rights." *Id.* "The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 373 N.C. 16, 19 (2019).

A. Respondent-Father

¶ 19 **[2]** Respondent-father's parental rights were terminated upon the existence of two grounds: neglect under N.C.G.S. § 7B-1111(a)(1) and failure to make reasonable progress under N.C.G.S. § 7B-1111(a)(2).

¶ 20 As we first consider the ground of neglect here, the General Statutes of North Carolina authorize the termination of the parental rights of a parent if the parent neglects his or her child such that the child meets the statutory definition of a "neglected juvenile." N.C.G.S. § 7B-1111(a)(1) (2021). A juvenile is deemed to be "neglected" when the child's parent, *inter alia*, "[d]oes not provide proper care, supervision, or discipline" or "[c]reates or allows to be created a living environment that is injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2021).[3]

> Termination of parental rights based upon this statutory ground requires a showing of neglect at the time of the termination hearing or, if the child has been separated from the parent for a long period of time, there must be a showing of a likelihood of future neglect by the parent. When determining whether such future neglect is likely, the district court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing.

In re R.L.D., 375 N.C. 838, 841 (2020) (extraneity omitted). "The determinative factors must be the best interests of the child and the fitness of the parent to care for the child at the time of the termination proceeding." *In re Ballard*, 311 N.C. 708, 715 (1984) (emphasis omitted).

¶ 21 Respondent-father does not dispute that his children were previously adjudicated to be neglected juveniles, but he argues that the trial court erred in determining that there was a "very high" risk of repetition of neglect if the children were returned to his care. Respondent-father contends that the trial court failed to consider his ability to participate in services during his incarceration when reaching its conclusion that neglect would likely be repeated if the children were returned to him.

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3. This statutory definition was amended by Session Law 2021-132, which went into effect on "October 1, 2021, and applies to actions filed or pending on or after that date." Act of Sept. 1, 2021, S.L. 2021-132, § 1(a), 2021 N.C. Sess. Laws 165, 170.

¶ 22 Respondent-father challenges two findings of fact which are relevant to the trial court's neglect determination:

> 36. On March 21, 2017, [respondent-father] tested positive for Cocaine and Marijuana. He completed his recommended 20 hours of substance abuse sessions; however, he missed more than half of the batterer's intervention sessions and was terminated from the program in September 2017. He was arrested in August 2017 for failure to pay child support on another child not involved with DSS, but he paid the amount with the help of [respondent-mother] and was released. [DSS] is not aware of any services or programs that [respondent-father] has participated in or completed during his incarceration. He has not visited with or spoken to his children since September 28, 2017.
>
> 37. In [respondent-father]'s answer to the allegations in the TPR petition he admits to being a no call no show for his individual counseling session on May 4, 2017, June 8, 2017, August 16, 2017, and September 6, 2017. [Respondent-father] also admitted that he has not participated in any substance abuse, mental health, parenting education, or domestic violence services while incarcerated.

¶ 23 With regard to Finding of Fact 36, respondent-father argues that he did not miss "more than half" of his batterer's intervention sessions in September 2017, citing earlier orders entered in the case. However, Roxie Cashwell, who was the DSS social worker assigned to work with the family at that time, specifically testified that, as to respondent-father's participation in the batterer's intervention program, respondent-father "missed more than half of the required sessions and so he was terminated from the program." The social worker's unequivocal testimony provided clear, cogent, and convincing evidence to support the challenged Finding of Fact 36.

¶ 24 Respondent-father also submits that while the portion of Finding of Fact 36 was "technically correct" in stating that DSS was unaware of any services that respondent-father completed in prison, nonetheless it "does not address whether [DSS] actually met its burden to prove such services were actually available." Respondent-father's argument concerning this point is part of his broader contention that the trial court erred in concluding that grounds for termination of parental rights exist,

to the extent that the conclusion that such grounds are existent is supported by this passage of the trial court's Finding of Fact 36. Although we address this argument in further detail below, we recognize that here respondent-father does not assert that this portion of Finding of Fact 36 was unsupported by the evidence, and hence we leave the finding undisturbed.

¶ 25 As to Finding of Fact 37, respondent-father asserts that the finding misrepresents his answer to the termination of parental rights petition. Respondent-father claims that he denied, rather than admitted, DSS's allegation that he "has not participated in any substance abuse, mental health, parenting education, or domestic violence services known to [DSS] while incarcerated." On this point, respondent-father's argument is supported by the record and the trial court's finding is not supported. Respondent-father's response to the termination petition specifically stated that he denied the relevant allegation,[4] "in that he has participated in substance abuse and parenting education classes while incarcerated." We therefore disregard Finding of Fact 37 because it is not supported by clear, cogent, and convincing evidence. *See In re J.M.J.-J.*, 374 N.C. 553, 559 (2020) (disregarding adjudicatory findings of fact not supported by clear, cogent, and convincing evidence).

¶ 26 With respect to the ground of neglect itself, respondent-father argues that the trial court's findings fail to show his circumstances at the time of the termination of parental rights hearing, such that the trial court could not adequately assess whether there was a likelihood of repetition of neglect if the children were returned to his care. Respondent-father contends that the trial court centered its decision to terminate his parental rights entirely on his imprisonment. Respondent-father believes that "[t]he court's decision seems frozen in time as of October 2017 and implies there was nothing that the Respondent-Father could do to change the court's predisposition to terminate parental rights through incarceration."

> A parent's incarceration may be relevant to the determination of whether parental rights should be terminated, but our precedents are quite clear—and remain in full force—that incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision. Thus, respondent's incarceration, by itself, cannot serve as clear, cogent, and

4. DSS lodged the allegation under both the neglect ground and the failure to make reasonable progress ground, and respondent-father denied both allegations in identical fashion.

> convincing evidence of neglect. Instead, the extent to which a parent's incarceration . . . support[s] a finding of neglect depends upon an analysis of the relevant facts and circumstances, including the length of the parent's incarceration.

In re K.N., 373 N.C. 274, 282–83 (2020) (extraneity omitted).

¶ 27 Here, the trial court's findings of fact demonstrate that it properly considered respondent-father's incarceration as a relevant factor, while also making other findings which showed a likelihood of future neglect of the children by him. The trial court found facts which chronicled respondent-father's behavior during the entire history of the case, encompassing both the period of time when he was incarcerated as well as the span of time when he was released. These findings show that respondent-father was in jail for drug offenses when the initial juvenile petition was filed in December 2016 and that after his release, respondent-father tested positive for cocaine and marijuana and was arrested for failure to pay child support. Although respondent-father successfully completed twenty hours of substance abuse sessions, he failed to complete his batterer's intervention program. After the children had already been in the custody of DSS for many months, respondent-father was arrested in October 2017 for trafficking heroin and cocaine; these crimes constitute offenses for which he was eventually sentenced to several years in federal prison. Respondent-father had not seen, nor spoken with, his children since September 2017—just prior to this arrest—with approximately three years having passed between the last time that respondent-father had such contact with the juveniles and the last date of the termination of parental rights hearing.

¶ 28 Additionally, respondent-father does not challenge any of the trial court's findings of fact which address a primary reason for DSS's involvement with respondents; namely, the extensive history of domestic violence between respondent-father and respondent-mother. After respondent-father was released from incarceration in March 2017, respondent-father engaged in domestic violence against respondent-mother merely one month later in April 2017. The trial court specifically found that "there is a great likelihood that [respondents] will reunite when [respondent-father] is released from prison. Their history of domestic violence and drug dealing renders them unsafe to parent as a couple."

¶ 29 The evidence presented at the termination of parental rights hearing and the trial court's resulting findings of fact which were based upon

the evidence amply support the trial court's determination that there was a "very high" likelihood of repetition of neglect if the children were returned to respondent-father's care. Respondent-father does not challenge the trial court's finding that "[the children] have been in the nonsecure custody of [DSS] for forty-six (46) months, and [respondent-father] is no closer to reunification today than when the original juvenile petition was filed on December 15, 2016." During the brief time that respondent-father was released from incarceration while this juvenile case was pending, he made minimal progress on his case plan and engaged in further domestic violence and drug trafficking, which in turn led to a new, longer period of incarceration. The trial court further determined that whenever respondent-father's incarceration ends, he is likely to return to his toxic relationship with respondent-mother, despite their unaddressed problematic cycle of domestic violence that the trial court found "renders them unsafe to parent as a couple." Based on these findings, the trial court properly concluded that respondent-father's parental rights could be terminated based upon the ground of neglect. Since this Court has concluded that one termination ground is supported by the evidence and the trial court's resulting determinations, we decline to address respondent-father's arguments which dispute the existence of the other termination ground found by the trial court under N.C.G.S. § 7B-1111(a)(2). *See In re A.R.A.*, 373 N.C. 190, 194 (2019) ("[A] finding of only one ground is necessary to support a termination of parental rights . . . .").

B. Respondent-Mother

¶ 30 **[3]** Respondent-mother's parental rights to the juveniles Brian, Cyrus, and Quintessa were also terminated based on the ground of neglect. Like respondent-father, respondent-mother does not contest the fact that her children were previously adjudicated to be neglected, but she instead argues that the trial court erred by determining that there was a very high likelihood of repetition of neglect if the children were returned to her care. *See In re R.L.D.*, 375 N.C. at 841.

¶ 31 Respondent-mother challenges the following findings of fact which are relevant to the determination of the existence of the ground of neglect with regard to her:

> 22. Although [respondent-mother] has attended multiple DBT group sessions, [DSS] has had, and continues to have, grave concerns about her mental health. [Respondent-mother] displays anger quickly and in front of service professionals, social workers, foster

> parents, and the children. She presents as very hyper at times and lacks focus. She has been observed by social workers and the undersigned on multiple occasions talking to herself in court.
>
> . . . .
>
> 26. Throughout the life of the case, [respondent-mother] has had sporadic employment. . . .
>
> . . . .
>
> 40. [DSS] and [the guardian ad litem] contend that sufficient evidence of neglect and continuing neglect has been presented, and the undersigned agrees. [Respondent-mother] has not shown that she can parent, care for, or provide for all four children, and she has not demonstrated that she can control her anger and negative behaviors. . . .
>
> 41. . . . Despite attending multiple individual therapy sessions [respondent-mother] has continued to exhibit poor anger management and coping skills. The histories of [respondents] provide further evidence that the probability of the repetition of neglect of the juveniles is very high. [Respondent-mother] is not in a position to care for the juveniles due to her lack of responsible decision making, history of being dishonest with [DSS], mental health issues, and questionable stability.

¶ 32 Respondent-mother challenges the description of her employment history in Finding of Fact 26 as "sporadic." She relies on DSS Social Worker Cashwell's testimony that "[respondent-mother] has always been able to get a job" to refute the trial court's finding. However, the term "sporadic" was expressly utilized by the social worker when she testified about respondent-mother's employment history as follows: "[Respondent-mother] will work somewhere for a couple weeks, and then she will not work for a couple weeks and then go somewhere else and work for a month or two, and then not, so it's very *sporadic*." (Emphasis added.) DSS Social Worker Constance Ebomah, who inherited the case from Social Worker Cashwell, also testified that Social Worker Ebomah was generally unable to verify respondent-mother's employment and agreed with the DSS attorney "that even though there may have been some mention of employment here and there, and

perhaps even some proof of employment in March 2019, there were times [respondent-mother] clearly was not employed." The testimonial accounts of the two social workers involved in this case provided clear, cogent, and convincing evidence to support the trial court's Finding of Fact 26.

¶ 33 Respondent-mother argues that Findings of Fact 22, 40, and 41 are not supported by the record because they do not accurately reflect her circumstances as of the time of the termination of parental rights hearing with respect to her mental health, anger issues, and ability to parent her children. Respondent-mother represents that she made significant progress on these issues during the years that the case proceeded, such that there was no longer a risk of repetition of neglect if the children were returned to her. Respondent-mother posits that, at the time of the termination of parental rights hearing, she had (1) substantially complied with her case plan, as reflected by the trial court's findings that she had maintained housing and employment since January 2019; (2) been consistent with her mental health treatment; (3) not had a positive screen for controlled substances since February 2019; and (4) "substantially complied with the court's orders."

¶ 34 In support of her contention that the trial court's findings ignore the progress that she had made up to the occurrence of the termination of parental rights hearing, respondent-mother cites the testimony of Social Worker Cashwell, who was the case social worker from June 2017 until she became a social worker supervisor in May 2018, and the testimony of Social Worker Ebomah, who succeeded Cashwell as the case social worker in May 2018 and served in this capacity until May 2019. Social Worker Cashwell testified on 5 September 2019 at the termination of parental rights hearing that respondent-mother "is a little calmer and you're able to talk to her. . . . I'm not getting the rambling through the conversation that I used to get when she would go off on random tangents. She still has her bouts, but overall the interactions that I have had with her, I have seen a change, a positive change." During the termination hearing on 24 October 2019, Social Worker Ebomah rendered the following testimony about Social Worker Ebomah's interactions with respondent-mother as the two of them discussed aspects of respondent-mother's behavior in pursuing the case plan:

> [W]hen I looked back at how she would handle and deal with everyone else before I became her worker, *I didn't experience a lot of the explosive when — she wasn't like that with me.* And like I said, she would get upset sometimes, and we'd have situations to

> where I told her that, you know, my exact words to her was, [respondent-mother], you have to stop acting like you're crazy when you are talking and dealing with people. You have to calm down and listen. Because you're not going to like everything people say to you. And you know, the only thing she said to that was "yes, ma'am". I used to get that a lot with her; yes, ma'am; no, ma'am; yes, ma'am; no, ma'am. That's how she was with me most of the time.

(Emphasis added.) When she resumed her testimony at the termination hearing's 12 December 2019 session, Social Worker Ebomah agreed, consistent with her earlier account, that respondent-mother would receive constructive feedback and that her therapy was "having an impact in her personality and keeping her a lot more calmer."

¶ 35 Despite these positive observations by Social Worker Cashwell and Social Worker Ebomah regarding respondent-mother's improved demeanor, both social workers also expressed concern about respondent-mother's issues and doubted respondent-mother's ability to parent all of her children together. Social Worker Cashwell ended her testimony by stating that respondent-mother "has made some great improvements, though I do think that she has still some work to do if she is going to manage five children 100 percent." Social Worker Ebomah testified that when she observed visits between respondent-mother and all of respondent-mother's children, Social Worker Ebomah was "concerned about that because although she was appropriate with them, it was just so overwhelming. She just didn't know what to do because she didn't know — she didn't know them, so she didn't know what to do with them." Social Worker Ebomah went on to testify that "the entire time that I had the case, it just didn't seem to be a priority of [respondent-mother] to make sure that her mental health was in order so she could parent her children."

¶ 36 The juveniles' guardian ad litem (GAL) also had concerns about respondent-mother's mental health conditions and respondent-mother's ability to parent all of the children. The GAL described the behavior of respondent-mother as "very erratic at times" and testified at the termination of parental rights hearing about several visits between respondent-mother and the juveniles during which respondent-mother was asked to leave due to her behavior. The GAL also recounted the problems that he witnessed during respondent-mother's visits with all four of her children, as follows:

> We observed visits where it was just her and one child, maybe two children, and she was able to tend to their needs, but when it came to all four, she would just get so frustrated, that the kids would be playing by themselves and she still couldn't manage it, you know. And the social worker was always in there, basically for the safety of the children, because there was [sic] times that she would have to intervene so one of the children wasn't hurt.

The GAL further testified that respondent-mother "is not realistic in her expectation of the kids or even realistic in the situation of the kids."

¶ 37 In addition, the trial court made several unchallenged findings of fact which described respondent-mother's repeated angry outbursts throughout the duration of the case including on the following occasions: (1) a March 2017 visit between respondent-mother and the children in which she "became erratic, refused to calm down, and continued to use profanity"; (2) a visit which respondent-mother had with the children in January 2018 during which respondent-mother "became agitated at the facilitator for redirecting her[,] . . . law enforcement was involved, and the visit stopped"; and (3) a December 2019 visit of respondent-mother with the children which occurred while the termination of parental rights hearing was in progress, during which respondent-mother "was yelling, screaming, and accusing her cousin and all of the placement providers of mistreating her children."

¶ 38 The foregoing recapitulation of matters on the record in the present case shows that there was clear, cogent, and convincing evidence to support the trial court's Findings of Fact 22, 40, and 41, including the tribunal's determination that there was a "very high" likelihood of repetition of neglect if the children were returned to respondent-mother's care. While respondent-mother achieved progress on her case plan during the nearly four years that her children were in DSS custody, nonetheless respondent-mother did not make sufficient progress in order to demonstrate that there would not be a repetition of neglect. Respondent-mother remained prone to display angry outbursts, even as late in this series of occurrences as a visit with her children which transpired during the termination hearing proceedings. Neither the DSS social workers nor the GAL believed that respondent-mother had developed the necessary skills to care for all of her children simultaneously by the time of the termination of parental rights hearing.

¶ 39 Moreover, just as respondent-father, respondent-mother does not challenge the trial court's finding of fact that respondents will likely

reunite after respondent-father has served his prison sentence, despite respondents' unaddressed domestic violence cycle that the trial court found "renders them unsafe to parent as a couple." In light of these facts, the trial court properly concluded that there was a likelihood of repetition of neglect if the children were returned to respondent-mother's care, thus rendering her parental rights to be eligible for termination based on neglect. Since we have determined that this ground for termination is supported by the evidence and the trial court's resulting determinations, we refrain from evaluating respondent-mother's arguments which contest the existence of the remaining termination ground found by the trial court under N.C.G.S. § 7B-1111(a)(2). *See In re A.R.A.*, 373 N.C. at 194.

IV. Conclusion

¶ 40 The trial court did not abuse its discretion in denying respondent-father's motion to continue the termination of parental rights hearing after the trial court had already permitted respondent-father to obtain three previous continuances in an unsuccessful attempt to secure respondent-father's participation at the hearing and there was no presentation offered that the allowance of any further continuances would enhance respondent-father's ability to remotely attend the termination hearing. In addition, the trial court made sufficient findings of fact which were premised upon clear, cogent, and convincing evidence to support its ultimate conclusion that the parental rights of both respondent-mother and respondent-father were subject to termination based upon the existence of the ground of neglect. Neither parent has brought forward in this appeal any challenge to the trial court's determination of the best interests of the juveniles. Consequently, the trial court's conclusion that it was in the best interests of the children Brian, Cyrus, Quintessa, and Craig that respondents' parental rights be terminated as ordered remains intact upon this Court's determination that the trial court did not commit error in this case. Therefore, we affirm the trial court's order regarding the termination of the parental rights of respondent-mother and respondent-father.

AFFIRMED.

IN RE C.H.

[381 N.C. 745, 2022-NCSC-84]

IN THE MATTER OF C.H. & J.H.

No. 176A21

Filed 15 July 2022

1. Termination of Parental Rights—permanency planning—cessation of reunification efforts—no change in plan—parent given additional opportunity for compliance

The trial court did not err by ordering the department of social services to cease reunification efforts between a father and his children—even though the court did not change the primary permanent plan from reunification—based upon findings that the father did not fully acknowledge his responsibility in the removal of his children from his care and the effect his mental health issues had on his parenting skills, that he had a pattern of noncompliance with his case plan, and that he continued to be aggressive and abusive with DSS workers. Given the father's behavior, the court did not violate N.C.G.S. § 7B-906.2(b) by deciding to give the father additional time to demonstrate compliance with his case plan rather than immediately eliminate reunification as a permanent plan.

2. Termination of Parental Rights—permanency planning—eliminating reunification—statutory factors—availability of parent

In an appeal from a termination of parental rights (TPR) order and an earlier permanency planning order, although the findings in the TPR order challenged by the father regarding his lack of progress on his case plan were supported by competent evidence and the trial court made sufficient findings to address subsections (d)(1), (d)(2), and (d)(4) as required by N.C.G.S. § 7B-906.2 before eliminating reunification as a permanent plan in the earlier order, there were insufficient findings addressing subsection (d)(3)—whether the father remained available to the court, the department of social services, and the guardian ad litem. Since the trial court substantially complied with the statute, the appropriate remedy was not to vacate the permanency planning order, but to remand for entry of additional findings of fact.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) (2019) from orders entered on 22 February 2021 by Judge Eula E. Reid in District Court, Currituck County, and on writ of certiorari to review an order and a permanency planning order entered on 6 March 2020 by Judge Eula E. Reid in District Court, Currituck County and an order entered on 21 May 2021

by Meader W. Harriss III in District Court, Currituck County. This matter was calendared for argument in the Supreme Court on 1 July 2022 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Courtney S. Hull for petitioner-appellee Currituck County Department of Social Services.

Keith Karlsson for appellee Guardian ad Litem.

Robert W. Ewing for respondent-appellant father.

EARLS, Justice.

¶ 1 Respondent-father appeals from the trial court's 6 March 2020 order ceasing reunification efforts, the 6 March 2020 permanency planning order eliminating reunification as a permanent plan, and 22 February 2021 orders terminating his parental rights to his sons, C.H. (Chris) and J.H. (James),[1] as well as the 21 May 2021 order dismissing his appeal from the 6 March 2020 orders. Because we conclude that the permanency planning order lacked findings which address one of the four issues contemplated by N.C.G.S. § 7B-906.2(d), we remand to the trial court for a further hearing and for the entry of additional findings. However, because as authorized by N.C.G.S. § 7B-1001(a2) respondent's claim of error concerning the trial court's permanency planning order is properly resolved by remand in this case, and does not necessitate vacating or reversing the challenged permanency planning order, it is presently premature for this Court to consider the trial court's orders terminating respondent's parental rights. *See* N.C.G.S. § 7B-1001(a2) (2019).

I. Background

¶ 2 On 12 April 2019, the Currituck County Department of Social Services (DSS) filed juvenile petitions alleging that Chris, born November 2017, and James, born September 2018, were neglected juveniles. The petitions alleged that DSS had been providing services to the family since 19 November 2018 after it received a Child Protective Services (CPS) report alleging that the children were living in an injurious environment. The allegations in the report "involved high risk, potentially lethal

1. Pseudonyms are used in this opinion to protect the juveniles' identities and for ease of reading.

behavior in front of the children such as suicidal attempts or gesturing." The petitions also alleged that the parents had engaged in physical and verbal domestic violence while the children were present.

¶ 3 The family began receiving in-home services on 2 January 2019. The petitions alleged that while CPS was providing in-home services, the parents continued "to show concerning behavior regarding physical and verbal violence." The petitions also alleged concerns regarding the impact of respondent's mental illness on his ability to be the sole caregiver for the children. Respondent reported being diagnosed with bipolar disorder and schizophrenia and being prescribed four psychiatric medications.

¶ 4 The petitions further alleged that on 11 April 2019, respondent restricted DSS's access to his home and children. Respondent informed DSS that he was seeking legal counsel after complaining of DSS coming to his home unannounced after hours. He requested proper notice before DSS's arrival at his home and the presence of a supervisor. DSS obtained nonsecure custody of the children upon the filing of the juvenile petitions.

¶ 5 On 2 August 2019, the trial court entered an order adjudicating the children neglected based, in part, on stipulations by respondent. In its disposition order entered on 16 August 2019, the court ordered respondent to comply with the components of his Out-of-Home Services Agreement, which required him to participate in mental health therapy to include domestic violence, anger management, and a substance abuse assessment and follow all recommendations; comply with all recommendations from his parental capacity evaluation; secure and maintain housing; participate in a group parenting education class and demonstrate skills learned during visitation; comply with the child support enforcement agency; and seek and maintain employment. The court awarded respondent two and a half hours of supervised visitation twice per week.

¶ 6 On 18 November 2019, DSS suspended respondent's visitations with his children due to concerns regarding respondent's emotional and mental stability after he "demonstrated volatile and hostile behavior while in the presence of [his] children during visitation[s]." During the 18 November 2019 visit, respondent told the social worker he was frustrated with Chris's behaviors and wanted to "pop" him. When the social worker informed him that "the use of any form of corporal punishment was not an acceptable form of discipline," respondent became upset and "asked how he was supposed to redirect his children if he was not

allowed to do that." The social worker attempted to provide alternative discipline techniques, but respondent "was too upset to let her speak." During this interaction, respondent "continuously raised his voice, was argumentative with various [DSS] staff and displayed grandiose gestures all while holding [James] in his arms." Respondent "continued to express his frustration" and remained argumentative after the children were removed from the visit, resulting in DSS "asking to have him removed from the building."

¶ 7 The trial court held a hearing on 22 November 2019 but determined that good cause existed to continue the matter to 20 December 2019 "to allow [respondent] to provide the [c]ourt with a letter from [respondent's] therapist setting forth his progress or lack thereof[.]" The court determined respondent's visitation should remain suspended and that "the resumption of visitation should not commence until such time as [respondent], through his attorney, shall provide to the [c]ourt a current letter from his mental health provider confirming he is current and actively participating in his mental health treatment and medication management."

¶ 8 Following the 20 December 2019 hearing, the court ceased reunification efforts with respondent but continued its decision regarding a change in the permanent plan until the next hearing "to allow [respondent] to demonstrate to the court that he can progress toward reunification." The trial court entered its order from the December 2019 hearing on 6 March 2020. The court found that the "most prominent barrier" to the children's reunification with respondent is his inappropriate "display of various emotions and behaviors" including his "verbal aggression" and "combativeness" toward the social workers. The court found that respondent often called DSS "multiple times a day demanding to speak with someone and on any given day, he will ask to speak with various staff at [DSS]. If he does not get the answer he wants after speaking with one person, he will move on to the next person[,]" and some days he "called [DSS] more than ten times requesting the same information from various workers." The court also found that respondent "often gets upset and argumentative using vulgar and threatening language, especially when he does not understand, or does not want to understand, what [DSS] staff is trying to explain to him. He will cut them off, monopolize conversation, not let them say anything, and hang up."

¶ 9 The court also found that respondent continued to minimize his involvement with the children being removed from the home and failed to "see the connection between his mental health concerns and his parenting skills." The court found respondent had only "minimally

complied" with the trial court's orders and had a "pattern of starting and then stopping a service when it no longer suits his needs." The court further found that respondent "continuously demonstrates his inability to accept constructive criticism, which impedes his ability to parent his children appropriately and is a skill that he must be able to demonstrate as his children get older and begin school, especially for [Chris] who has" a severe hearing disability that requires regular attention. The court found that it was in the best interests of the children to cease reasonable efforts toward reunification with respondent "as such efforts to reunify would be clearly futile or would be inconsistent with the juveniles' health, safety, and need for a safe permanent home within a reasonable period of time." The court continued the permanent plan of reunification finding that although DSS was no longer required to make reasonable efforts toward reunification, the court "ha[d] not yet made a determination as to the best plan of care to achieve a safe, permanent home for the children within a reasonable period of time" and continued its decision on that issue until the next hearing.

¶ 10 The court held another permanency-planning hearing on 7 February 2020. In its permanency planning order entered on 6 March 2020, the court found that the conditions which led to the filing of the petitions continued to exist and that the return of the children to either parent would be contrary to the juveniles' welfare. Respondent was arrested on 3 February 2020 on misdemeanor charges of intoxication, possession of drug paraphernalia, and resisting an officer following an incident at a gas station. The court ceased reunification efforts, changed the permanent plan to adoption with a concurrent plan of guardianship, and ordered DSS to file a petition to terminate the parents' parental rights. On 23 March 2020, respondent filed a notice to preserve his right of appeal from the 6 March 2020 order "wherein the [trial court] found that reasonable efforts to reunify the family should cease."

¶ 11 DSS filed its petitions to terminate respondent's parental rights on 20 April 2020[2] alleging that grounds existed based on neglect, willfully leaving the children in foster care without making reasonable progress to correct the conditions which led to their removal from the home, willful failure to pay a reasonable cost of the children's care, and dependency. *See* N.C.G.S. § 7B-1111(a)(1)–(3), (6) (2021).

¶ 12 After multiple continuances, the trial court conducted a termination-of-parental-rights hearing on 6 November and 4 December 2020. In its

2. The termination petitions also requested that the trial court terminate the mother's parental rights; however, she is not a party to this appeal.

adjudication order entered on 22 February 2021, the trial court determined grounds existed to terminate respondent's parental rights based on neglect, willfully leaving the children in foster care without correcting the conditions which led to their removal, and dependency. *See* N.C.G.S. § 7B-1111(a)(1)–(2), (6). In a separate disposition order entered the same day, the court concluded that termination of respondent's parental rights was in the children's best interests. *See* N.C.G.S. § 7B-1110(a) (2021). Therefore, the court terminated respondent's parental rights. Respondent entered a notice of appeal in which he stated that he intended to appeal "the Order eliminating reunification that was filed on March 6th, 2020"; although respondent's notice of appeal also references "[t]he order terminating the Respondent-Father's rights . . . filed on February 22nd, 2021," respondent did not explicitly state that he intended to appeal the termination orders and he did not file a separate notice of appeal from the termination orders because he was "under the belief that a single Notice of Appeal needed to be filed to appeal both the ceasing of reunification efforts and the termination of parental rights."

¶ 13 On 14 May 2021, the guardian ad litem (GAL) moved to dismiss respondent's appeal in the trial court. The GAL argued that the notice of appeal did not give notice that respondent was appealing from the termination orders but stated only that the termination orders were filed on 22 February 2021. The GAL further argued that because respondent did not properly file a notice of appeal from the termination orders, he did not meet the conditions set forth in N.C.G.S. § 7B-1001(a1)(2) to appeal the order eliminating reunification as the permanent plan and did not have a right to appeal the order to this Court.

¶ 14 Following a hearing, the trial court entered an order on 21 May 2021 denying the motion to dismiss respondent's appeal of the termination orders, determining that the notice of appeal was "was properly filed, and complied with N.C.G.S. [§] 7B[-]1001(a1)(1) for the purposes of appealing the Termination of Parental Rights order despite [a] scrivener's error." However, the trial court dismissed respondent's appeal of the orders ceasing reunification and eliminating reunification as a permanent plan.

¶ 15 On 1 June 2021, DSS and the GAL filed a joint motion to dismiss respondent's appeal in this Court alleging that the notice of appeal did not give notice that he was appealing the termination orders and respondent did not have a right to appeal the order eliminating reunification without a proper appeal of the termination orders.

¶ 16 Respondent filed a petition for writ of certiorari with this Court on 10 June 2021. Respondent sought review of the 21 May 2021 Order on

Motion to Dismiss entered by Judge Meader W. Harriss III and from "the Order and the Permanency Planning Review Order, entered on March 6, 2020 by [the] Honorable Eula E. Reid, ceasing reunification efforts with [respondent]."

¶ 17 DSS and the GAL filed a second motion to dismiss the appeal on 4 August 2021. By order entered on 10 August 2021, we allowed respondent's petition for writ of certiorari and denied DSS and the GAL's motions to dismiss the appeal.

II. Analysis

¶ 18 Respondent filed his notice of appeal from the 22 February 2021 termination of parental rights orders, and this Court allowed review by writ of certiorari of the 6 March 2020 orders which ceased reunification efforts and eliminated reunification as the children's permanent plan. *See* N.C.G.S. § 7B-1001(a1) (2019). Pursuant to N.C.G.S. § 7B-1001(a2), we "review the order eliminating reunification together with an appeal of the order terminating parental rights."

¶ 19 Respondent limits his appeal to challenges to the trial court's 6 March 2020 order and 6 March 2020 permanency planning order. Although he does not identify any error in the orders terminating his parental rights, respondent contends that the alleged reversible errors in the permanency planning order require us to vacate the termination orders under N.C.G.S. § 7B-1001(a2). *See* N.C.G.S. § 7B-1001(a2) ("If the order eliminating reunification is vacated or reversed, the order terminating parental rights shall be vacated.").

¶ 20 Our review of a permanency planning order "is limited to whether there is competent evidence in the record to support the findings [of fact] and whether the findings support the conclusions of law." *In re L.M.T.*, 367 N.C. 165, 168 (2013) (alteration in original) (quoting *In re P.O.*, 207 N.C. App. 35, 41 (2010)). "The trial court's findings of fact are conclusive on appeal if supported by any competent evidence." *In re L.M.T.*, 367 N.C. at 168. "The trial court's dispositional choices—including the decision to eliminate reunification from the permanent plan—are reviewed only for abuse of discretion, as those decisions are based upon the trial court's assessment of the child's best interests." *In re L.R.L.B.*, 377 N.C. 311, 2021-NCSC-49, ¶ 11. "An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *In re J.H.*, 373 N.C. 264, 268 (2020) (quoting *In re N.G.*, 186 N.C. App. 1, 10–11 (2007), *aff'd per curiam*, 362 N.C. 229 (2008)).

A. Ceasing Reunification Efforts

¶ 21 **[1]** Respondent first argues the trial court erred in ceasing reunification efforts with him following the 20 December 2019 hearing because reunification remained the primary plan for the children.

¶ 22 In adopting concurrent permanent plans,

> [r]eunification shall be a primary or secondary plan unless the court made findings under G.S. 7B-901(c) or G.S. 7B-906.1(d)(3), the permanent plan is or has been achieved in accordance with subsection (a1) of this section, or the court makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety. . . . *Unless permanence has been achieved, the court shall order the county department of social services to make efforts toward finalizing the primary and secondary permanent plans and may specify efforts that are reasonable to timely achieve permanence for the juvenile.*

N.C.G.S. § 7B-906.2(b) (2019) (emphasis added).[3]

¶ 23 Here, the trial court ceased reunification efforts with respondent following the 20 December 2019 hearing. In its order entered on 6 March 2020, the court found that respondent continued to minimize his responsibility in the removal of his children from his care, did not see the connection between his mental health concerns and his parenting skills, had a pattern of noncompliance with mental health treatment recommendations, and "continuously demonstrate[d] his inability to accept constructive criticism, which impedes his ability to parent his children appropriately." The court also found that respondent's inappropriate "display of various emotions and behaviors [was] the most prominent barrier toward reunification with him and his children." The court noted that respondent "constantly complains and argues with staff about how his children" came into DSS custody and why they have not been returned to his care and responded to social workers' attempts to assist him with "opposition, combativeness, and verbal aggression." The court also found that "[d]ue to his constant verbal aggression to

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3. The statute was amended effective 1 October 2021 to state that "[t]he finding that reunification efforts clearly would be unsuccessful or inconsistent with the juvenile's health or safety may be made at any permanency planning hearing, *and if made, shall eliminate reunification as a plan*." N.C.G.S. § 7B-906.2(b) (2021) (emphasis added).

include cursing, yelling, name calling, and other demeaning comments towards the current Social Worker, [respondent] was limited to only being allowed to communicate with the Foster Care Supervisor, . . . yet he continues to display these aggressive and inappropriate behaviors." Therefore, the court found that

> [p]ursuant to [N.C.G.S.] §[ ]7B-906.1(d)(3), for the reasons set forth herein, it is in the best interest[s] of the minor children, [Chris] and [James], to cease reasonable efforts toward reunification with [respondent], as such efforts to reunify would be clearly futile or would be inconsistent with the juveniles' health, safety, and need for a safe permanent home within a reasonable period of time.

The court further found, however, that "the [c]ourt has not yet made a determination as to the best plan of care to achieve a safe, permanent home for the children within a reasonable period of time; and, therefore, pending the [c]ourt's final determination of this issue at the next hearing, the goal for the children, [Chris] and [James], should remain reunification."

¶ 24 Citing the Court of Appeals' decision in *In re C.S.L.B.*, 254 N.C. App. 395 (2017), in which the Court of Appeals determined that "by leaving reunification as a secondary permanent plan for the children, Respondent-mother continued to have the right to have [ ]DSS provide reasonable efforts toward reunifying the children with her, and the right to have the court evaluate those efforts," *id.* at 398, respondent argues he was entitled to have DSS continue to provide reasonable efforts toward reunifying the children with him because reunification remained the primary permanent plan.

¶ 25 However, the Court of Appeals' decision in *In re C.S.L.B.* is distinguishable from this case because it involved a court order establishing guardianship for the children as the primary permanent plan and there were no findings that the respondent-mother was uncooperative with DSS or abusive toward the social workers. *In re C.S.L.B.*, 254 N.C. App. at 396–97. Therefore, the conclusion in *In re C.S.L.B.* that it was erroneous for the trial court to relieve DSS of further reunification efforts and to cease further review hearings is not applicable here. *See id.* at 398–99. Moreover, respondent has not argued that his lack of progress from 20 December 2019 to 7 February 2020 was due to DSS's failure to provide further reunification efforts or that the termination of parental rights orders must be reversed due to the trial court ceasing reunification efforts in the 6 March 2020 order. *See In re L.E.W.*, 375 N.C. 124, 128 (2020)

("[T]o obtain relief on appeal, an appellant must not only show error, but that . . . the error was material and prejudicial, amounting to denial of a substantial right that will likely affect the outcome of an action." (second alteration in original) (quoting *In re B.S.O.*, 234 N.C. App. 706, 713 (2014))).

¶ 26 Pursuant to N.C.G.S. § 7B-906.2(b), the trial court "may specify efforts that are reasonable to timely achieve permanence for the juvenile." Here, the trial court's findings describe respondent's verbal abuse and hostile behavior toward DSS workers, his failure to cooperate with DSS, and his multiple daily phone calls to DSS in which he refused to listen to or accept what he was being told. Based on this behavior, the trial court did not err in determining that it was reasonable for DSS to cease efforts toward reunification with respondent. The trial court at that time could also have eliminated reunification as a permanent plan but chose instead to provide respondent additional time to demonstrate his ability to make progress on his case plan. Respondent failed to do so, and the court eliminated reunification at the next permanency-planning hearing. Therefore, it was permissible for the trial court in this case to cease DSS's reunification efforts while allowing respondent an additional opportunity to demonstrate that he could comply with treatment recommendations regarding his mental health and potentially be reunited with his children.

B. Eliminating Reunification

¶ 27 **[2]** Respondent next argues the trial court erred by failing to make the factual findings required by N.C.G.S. § 7B-906.2(d) before eliminating reunification as the children's permanent plans in the 6 March 2020 permanency planning order.

¶ 28 Under N.C.G.S. § 7B-906.2(b), the trial court may eliminate reunification as a child's permanent plan if the trial court "makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." N.C.G.S. § 7B-906.2(b). In making such a determination, the trial court must make written findings "which shall demonstrate the degree of success or failure toward reunification," including:

> (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
>
> (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.

(3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.

(4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

N.C.G.S. § 7B-906.2(d).

¶ 29 "Although 'use of the actual statutory language [is] the best practice, the statute does not demand a verbatim recitation of its language.' " *In re L.E.W.*, 375 N.C. at 129 (alteration in original) (quoting *In re L.M.T.*, 367 N.C. at 167). "Instead, 'the order must make clear that the trial court considered the evidence in light of whether reunification would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time.' " *Id.* at 129–30 (quoting *In re L.M.T.*, 367 N.C. at 167–68).

¶ 30 "Moreover, when reviewing an order that eliminates reunification from the permanent plan in conjunction with an order terminating parental rights pursuant to N.C.G.S. § 7B-1001(a1)(2), we consider both orders together as provided in N.C.G.S. § 7B-1001(a2)." *In re L.R.L.B.*, ¶ 22 (cleaned up). Therefore, "incomplete findings of fact in the cease reunification order may be cured by findings of fact in the termination order." *Id.* (quoting *In re L.M.T.*, 367 N.C. at 170).

1. Challenged Findings

¶ 31 Respondent does not challenge the evidentiary support for any of the findings in the permanency planning order, and therefore they are binding on appeal. *In re T.N.H.*, 372 N.C. 403, 407 (2019). He does, however, generally challenge multiple findings in the trial court's termination orders in order to argue that the trial court's findings in the termination orders do not cure the deficiencies in the permanency planning order. Because we review the permanency planning order and the termination orders together, we first address his challenges to the trial court's findings of fact in the termination orders.

¶ 32 We review the findings of fact in a trial court's termination of parental rights adjudication order "to determine whether [they] are supported by clear, cogent and convincing evidence." *In re H.A.J.*, 377 N.C. 43, 2021-NCSC-26, ¶ 17. "The trial court's dispositional findings are binding on appeal if supported by any competent evidence." *In re J.S.*, 374 N.C. 811, 822 (2020).

¶ 33 Respondent generally challenges the trial court's findings indicating that his progress and participation in his case plan was not reasonable because

> 1) he has not corrected the conditions which led to his children's removal from the home; 2) that [he] is uncooperative; 3) that he failed to consistently participate in mental health treatment; 4) he lacks consistent mental health treatment and medication management; 5) he does not have the ability to parent his children; 6) that he has made minimal or no progress with his case plan; and 7) that he failed to maintain housing and employment.

Respondent argues these findings are not supported by competent evidence because they are based upon past circumstances that no longer exist.

¶ 34 Social worker Amanda Wood testified at the termination hearing regarding respondent's progress on his case plan goals. She testified that respondent "[m]inimally" complied with the trial court's order regarding his case plan, was not compliant with DSS in its reasonable efforts toward reunification, and was "minimally compliant" with his mental health therapy. She also testified that she did not feel respondent fully complied with the recommendations of the parental capacity evaluation and that although respondent completed parenting classes, he was not able to demonstrate what he learned during his visitations. Regarding his employment, Ms. Wood testified that respondent had multiple jobs throughout the case but that his longest employment lasted "about three weeks."

¶ 35 Ms. Wood acknowledged that respondent made some progress on his case plan but testified that his progress was very slow and that he had only recently showed improvement after the permanent plan was changed to adoption. She further testified that he had not demonstrated "a change in condition to the point that [she] would feel comfortable reunifying [respondent] with the children[.]" Ms. Wood also testified that respondent had demonstrated "a pattern of beginning services and stopping services" with both his mental health treatment and Chris's hearing impairment treatment.

¶ 36 Additionally, unchallenged findings in the adjudication order state that respondent failed to follow through with the recommendations from his parenting capacity evaluation; that there were "tremendous concerns" regarding respondent's follow through with Chris's hearing

impairment treatment; and that DSS continued to have concerns regarding respondent's consistency with his mental health treatment and medication management, his history and pattern of compliance and noncompliance, and his inability to accept that his behavior contributed to the need for DSS's involvement with the family. Based on the foregoing, we hold that the challenged findings are sufficiently supported by the record evidence.

2. Sufficiency of the Findings

¶ 37 Respondent argues the trial court's findings of fact in its 6 March 2020 permanency planning order fail to address the first three mandated findings under N.C.G.S. § 7B-906.2(d) and that the findings in the termination orders do not cure these deficiencies. Although the trial court's findings of fact adequately address the issues reflected in N.C.G.S. § 7B-906.2(d)(1)–(2) and (4), we agree the findings fail to address the issues in N.C.G.S. § 7B-906.2(d)(3) regarding whether respondent "remains available to the court, the department, and the guardian ad litem for the juvenile."

¶ 38 The trial court addressed the factor under N.C.G.S. § 7B-906.2(d)(1), whether respondent is making adequate progress within a reasonable period of time, by detailing respondent's progress and deficiencies in meeting the conditions of his case plan. The trial court made numerous findings regarding respondent's participation in therapy and visitation, respondent's employment, and respondent's housing. The court found that it was not possible to return the children to respondent's care immediately or within the next six months because he had not completed his case plan and that the conditions which led to the filing of the petitions continued to exist. Moreover, in the termination orders, the trial court found that although respondent made some progress on his case plan, "he never demonstrated to [the social worker] a change in condition such that she felt comfortable with moving forward toward reunification," and it found that "[t]he same conditions that brought these children into care continued over the year that [DSS] worked with [respondent]. The children have been in [a] placement outside of the home for more than twelve months at the time the petition[s for termination were] filed." The court also found that respondent "made some progress as to a change in condition since [DSS] intervened but his pattern of digression is concerning to the [c]ourt such that the [c]ourt feels his change in condition is insufficient under the circumstances in that he has failed to engage with [DSS] and work toward reunification." The court's findings show respondent did not address his mental health issues, "does not have the behavioral protective factors needed to parent

his children[,]" and "minimizes his involvement in the children's removal from the home." These findings sufficiently address whether respondent was making adequate progress under N.C.G.S. § 7B-906.2(d)(1).

¶ 39 Regarding N.C.G.S. § 7B-906.2(d)(2), whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile, the trial court's findings sufficiently describe respondent's participation with his case plan. In the termination orders, the court details respondent's progress and participation in his case plan goals and describes respondent's relationship and distrust of DSS. The court found that prior to his visitations being suspended on 18 November 2019, respondent "had been asked to leave [DSS] due to his behaviors, belligerent demeanors, cursing, and out of control behaviors at least five times." The court also found that respondent "ha[d] failed to comply with [DSS] and [c]ourt ordered goals[,]" "ha[d] been uncooperative with reunification services and efforts[,]" and "ha[d] been uncooperative with recommendations from therapists and [DSS]." These determinations satisfy the requirements of N.C.G.S. § 7B-906.2(d)(2). *See In re L.R.L.B.*, ¶ 27 (concluding that finding of fact that "featured the evidence adduced at the hearing of respondent-mother's inability to address the domestic violence, housing, and substance abuse issues which resulted in [the juvenile's] removal from her care . . . satisfy the requirements of Section 7B-906.2(d)(2)").

¶ 40 Respondent has not challenged the sufficiency of the findings regarding the fourth factor under N.C.G.S. § 7B-906.2(d)(4), whether the parents are "acting in a manner inconsistent with the health or safety of the juvenile." Nevertheless, we hold the trial court sufficiently addressed the substance of N.C.G.S. § 7B-906.2(d)(4). "Although the trial court made no specific finding as to whether [respondent] was 'acting in a manner inconsistent with the health or safety of the juvenile' under the exact language of N.C.G.S. § 7B-906.2(d)(4)," *In re L.R.L.B.*, ¶ 28, the trial court found that the conditions which led to the filing of the neglect petitions continued to exist, that the parents still demonstrated "extreme animosity" toward each other and had engaged in an online argument on or about 25 January 2020, and that the return of the children to the custody of either parent "would be contrary to the welfare and best interest[s] of the juveniles." The court also concluded that DSS was "no longer required to make reasonable efforts in this matter to reunify the children with either parent as those efforts would clearly be futile or would be inconsistent with the children's health and safety, and need for a safe, permanent home within a reasonable period of time." These determinations sufficiently address N.C.G.S. § 7B-906.2(d)(4).

¶ 41 However, we agree with respondent that the trial court failed to make the findings required under N.C.G.S. § 7B-906.2(d)(3), whether respondent "remains available to the court, the department, and the guardian ad litem." Aside from acknowledging respondent's attendance at the permanency-planning hearing and noting his lack of attendance at the termination hearing on 4 December 2020, the trial court failed to make any other findings addressing respondent's availability to the court, DSS, and the GAL. Although the court "found" that the GAL reported respondent had not had contact with her, the court did not make any determination regarding the credibility of the GAL's reporting, and this "finding" does not constitute a finding of fact. *See In re A.E.*, 379 N.C. 177, 2021-NCSC-130, ¶ 16 ("[R]ecitations of the testimony of each witness *do not* constitute *findings of fact* by the trial judge absent an indication concerning whether the trial court deemed the relevant portion of the testimony credible." (cleaned up)).

3. Remedy

¶ 42 Respondent argues that the trial court's failure to make the required findings under N.C.G.S. § 7B-906.2(d) requires this Court to reverse the permanency planning order and vacate the resulting termination orders pursuant to N.C.G.S. § 7B-1001(a2). However, in *In re L.R.L.B.*, we determined that when the trial court substantially complies with the statute but fails to make the findings required under N.C.G.S. § 7B-906.2(d)(3), the appropriate remedy is to remand the matter to the trial court for the entry of additional findings. *In re L.R.L.B.*, ¶ 37. We reasoned that this Court did not believe "that the Legislature enacted N.C.G.S. § 7B-1001(a2) with the intention of disengaging an entire termination of parental rights process in the event that a trial court omits a single finding under N.C.G.S. § 7B-906.2(d)(1)–(4) from its trial court order which eliminates reunification from a child's permanent plan." *Id.* ¶ 35. "Unlike the specific finding that 'reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety' which is required by N.C.G.S. § 7B-906.2(b) before eliminating reunification from the permanent plan, no particular finding under N.C.G.S. § 7B-906.2(d)(3) is required to support the trial court's decision." *Id.*

¶ 43 Therefore, in line with our holding in *In re L.R.L.B.*, we remand this matter to the trial court for entry of additional findings in contemplation of N.C.G.S. § 7B-906.2(d)(3).

> In the event that the trial court concludes, after making additional findings, that its decision to eliminate reunification from the juvenile[s'] permanent plan[s]

> in its [6 March 2020] permanency planning order was in error, then the trial court shall vacate said order as well as vacate the order terminating respondent[ ]'s parental rights, enter a new permanent plan for the juvenile[s] that includes reunification, and resume the permanency planning review process. If the trial court's additional findings under N.C.G.S. § 7B-906.2(d)(3) do not alter its finding under N.C.G.S. § 7B-906.2(b) that further reunification efforts are clearly futile or inconsistent with the juvenile's need for a safe, permanent home within a reasonable period of time, then the trial court may simply amend its permanency planning order to include the additional findings, and the [22 February 2021] order[s] terminating respondent[ ]'s parental rights may remain undisturbed.

Id. ¶ 37 (cleaned up).

III. Conclusion

¶ 44 Respondent does not identify any error in the orders terminating his parental rights to Chris and James, and we do not consider the termination orders in this decision. *See In re L.R.L.B.*, ¶ 38 (declining to consider termination order when vacating permanency planning order under analogous circumstances). Regarding the 6 March 2020 order ceasing reunification efforts with respondent following the 20 December 2019 hearing, we affirm the trial court's order. Regarding the 6 March 2020 permanency planning order eliminating reunification from the permanent plan following the 7 February 2020 hearing, we "hold that the trial court sufficiently addressed the majority of the issues mandated by N.C.G.S. § 7B-906.2(d)]," and therefore we are not required to vacate that order. *Id.* However, in light of the trial court's failure to make written findings as required by N.C.G.S. § 7B-906.2(d)(3), we remand to the District Court, Currituck County, to conduct a hearing[4]

4. We note that the District Court Judge who entered the relevant 6 March 2020 permanency planning order is unavailable to amend it because she was appointed to fill a vacant Superior Court judge seat in April 2021. Therefore, a substitute judge is required pursuant to Rule 63 of the North Carolina Rules of Civil Procedure. The Rule 63 substitute judge will need to hold a hearing to receive evidence relating to N.C.G.S. § 7B-906.2(d)(3) and enter any necessary findings of fact in an amendment to the relevant 6 March 2020 permanency planning order. *See In re K.N.*, 2022-NCSC-88, ¶ 24 (a Rule 63 substitute judge is required to conduct a hearing to enter new findings of fact and address deficiencies noted on appeal).

and "to enter such necessary findings and to determine whether those findings affect its decision to eliminate reunification from the permanent plan pursuant to N.C.G.S. § 7B-906.2(b)." *Id.* The trial court "shall enter new or amended orders consistent with this opinion." *Id.* (citing *In re K.R.C.*, 374 N.C. 849, 865 (2020)).

AFFIRMED IN PART; REMANDED IN PART.

IN THE MATTER OF J.A.J., K.D.M.J., AND P.A.P.J.

No. 269A21

Filed 15 July 2022

1. Termination of Parental Rights—parent's competency—inquiry—trial court's discretion

In a termination of parental rights case, the trial court did not abuse its discretion by not conducting an inquiry into respondent-mother's competency where the trial court was aware that she suffered from mental illness and that she was not consistent in receiving mental health treatment. The record showed that the trial court had the opportunity to observe respondent-mother throughout the proceedings and that she understood the nature of the proceedings, her role in them, and how to assist her attorney in preparing for them.

2. Termination of Parental Rights—grounds for termination—willful abandonment—incarceration—no contact with child

The trial court did not err by concluding that respondent-father's parental rights were subject to termination on the grounds of willful abandonment where he was incarcerated for nearly the entire time that his child was in the custody of social services and the evidence—including orders from prior proceedings and social workers' testimony that they were not aware of respondent-father ever calling the child or sending him any gifts—showed that he failed to make any efforts to communicate with his child during the relevant six-month time period.

3. Termination of Parental Rights—best interests of the child—dispositional factors—findings of fact—son's bond with mother and feasibility of adoption

The trial court did not abuse its discretion in determining that termination of respondent-mother's parental rights would be in her

son's best interests where the findings—including those concerning the son's bond with his mother and the feasibility of adoption despite the son's behavioral issues—were supported by the record evidence. The trial court properly considered the dispositional factors in N.C.G.S. § 7B-1110(a) and performed a reasoned analysis weighing those factors.

4. Termination of Parental Rights—best interests of the child—dispositional factors—incarcerated father—no contact with child

The trial court did not abuse its discretion in determining that termination of respondent-father's parental rights would be in his son's best interests where respondent would not be released from incarceration until three years after the trial court's termination order and he had made no effort to have any relationship with his son. The trial court properly considered dispositional factors in N.C.G.S. § 7B-1110(a) and performed a reasoned analysis weighing those factors.

Appeals pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 25 May 2021 by Judge Pell C. Cooper in District Court, Wilson County. This matter was calendared for argument in the Supreme Court on 1 July 2022 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Beaman & Bennington, PLLC, by Jennifer K. Bennington, for petitioner-appellee Wilson County Department of Social Services.

Matthew D. Wunsche, GAL appellate counsel, for appellee Guardian ad Litem.

Sean P. Vitrano for respondent-appellant mother.

Anné C. Wright for respondent-appellant father.

HUDSON, Justice.

¶ 1 Respondent-mother and respondent-father appeal from the trial court's orders terminating respondent-mother's parental rights to her minor children J.A.J. (Jake), K.D.M.J. (Karl), and P.A.P.J. (Pamela)[1] and

1. Pseudonyms have been used to protect the identities of the juveniles and for ease of reading.

an order terminating respondent-father's parental rights to Karl.[2] Upon review, we affirm.

I. Factual and Procedural Background

¶ 2 On 11 and 17 December 2018, the Wilson County Department of Social Services (DSS) filed separate juvenile petitions alleging that two-year-old Jake, six-year-old Karl, and newborn Pamela were neglected and dependent juveniles. Each petition alleged that on 7 December 2018, family members observed Karl to be "rigid, staring, grinding his teeth, having mild tremors, incontinent, weak, and [with] his left side . . . drooping." When respondent-mother did not seek immediate medical care for what she felt was more of "a behavioral issue," family members transported Karl to Wilson Medical Center, where his "condition rapidly deteriorated, and he lost the ability to speak." The next day, Karl was transferred to Vidant Medical Center where he was placed on a ventilator, after becoming unable to breathe. Respondent-mother reportedly refused to authorize medical treatment and was ultimately escorted from the facility by law enforcement officers.

¶ 3 During the course of an investigation, Karl disclosed that he had ingested pills belonging to respondent-mother's boyfriend. Respondent-mother admitted that she was a long-time substance abuser and that she was unable to provide a safe, stable environment for her children. The whereabouts of Karl's father, respondent-father, were unknown at the time.

¶ 4 DSS obtained nonsecure custody of Jake and Karl on 11 December 2018 and of Pamela on 18 December 2018.[3] Jake and Pamela were placed in foster care. Karl was placed with a relative "after several failed foster placements."

¶ 5 A hearing on the juvenile petitions was conducted on 20 February 2019. With the assistance of counsel, respondent-mother and respondent-father submitted stipulations in accord with allegations set forth in the juvenile petitions. After considering DSS reports, testimony, and respondents' stipulations, the trial court adjudicated Jake, Karl, and Pamela neglected and dependent juveniles by orders entered on 4 March 2019.

¶ 6 In its disposition orders entered on the same date, the trial court found, *inter alia*, that respondent-mother had acknowledged Karl

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2. Jake's father and Pamela's father are not parties to this appeal.

3. Pamela was born four days after the juvenile petitions for Jake and Karl were filed.

needed mental health treatment but had refused to authorize it. The trial court found that, "[w]hen he does not get what he wants," Karl has "severe behavior problems." His diagnoses include Adjustment Disorder, Oppositional Defiant Disorder, Attention Deficit Hyperactivity Disorder, and Sibling Relational Problem. He had run away from respondent-mother's home on numerous occasions, as well as the homes of every other caregiver, including foster families, with whom he had been placed. Between 11 and 21 December 2018, Karl had been placed in three foster homes and had one night of respite placement and one night of care at a hospital. Respondent-mother's visitation with Karl was suspended due to the severity of his behavior following her visits.

¶ 7 The court acknowledged that respondent-mother loves her children. But she also had a long history with Child Protective Services and a history of substance abuse. She did not feel the need for treatment for mental health issues or substance abuse.

¶ 8 At the time of the hearing on Karl's juvenile petition, respondent-father was incarcerated in the Craven County Correctional Institute on drug charges. He had not been an active part of Karl's life, but he indicated his desire to be a father to Karl upon his release.

¶ 9 The court ordered respondent-mother to complete a safety circle with a social worker and develop a safety plan to ensure the juveniles would be properly supervised at all times. She was also ordered to complete a psychological evaluation; work with a mental health provider to learn healthy coping skills, identify healthy relationships, and receive emotional support regarding her domestic violence relationships; and work with a parent trainer to learn parenting skills for a child with behavioral challenges. Respondent-mother was allowed a minimum of one hour of weekly supervised visitation with Jake and Pamela and a minimum of one and one-half hours of weekly supervised telephone contact with Karl. Respondent-father was allowed the same amount of supervised telephone contact with Karl and was ordered to work with a social worker to develop a service plan upon his release from incarceration.

¶ 10 A review hearing was conducted on 20 March 2019. In separate amended review orders entered for each juvenile on 11 April 2019, the trial court found that respondent-mother needed to address her substance abuse and mental health issues, refrain from domestic violence, and demonstrate an ability to provide a safe living environment and manage the juveniles' needs. Respondent-mother's in-person contact with Karl would remain suspended until his mental health needs were addressed and his trauma in conjunction with his visits with respondent-mother reduced. The court found that respondent-mother wanted to be reunified

with the juveniles. She had acquired public housing to accommodate herself and her children, had participated in a Child and Family Team Meeting on 3 January 2019; and had reportedly contacted Carolina Outreach to schedule a substance abuse evaluation.

¶ 11 The trial court further found that DSS had referred respondent-mother to psychologist Shartra Sylivant for a psychological evaluation, provided her with the contact information for the Social Security Administration to apply for social security disability benefits, and referred her to DSS's parenting program to assist her with learning how so that she could parent and manage children who had experienced past trauma. Respondent-father remained incarcerated.

¶ 12 In permanency-planning orders entered on 30 August 2019 following a 31 July 2019 hearing, the trial court found that return of the juveniles to respondent-mother's home would be contrary to their best interests due to her "partial progress within the last seven months towards her court ordered Family Services activities such as emotional/mental health, substance abuse including requested drug screens, and parenting." She had also refused to sign a family contact and visitation plan, comply with the visitation agreement, submit to requested drug screens, or submit to a substance abuse assessment. Respondent-mother believed Karl's behavior was the reason for DSS involvement and contended that the juveniles were wrongly adjudicated neglected and dependent.

¶ 13 After respondent-mother's limited participation in a psychological evaluation in June 2019, Sylivant diagnosed respondent-mother with "Cannabis and Phencyclidine (PC) use disorders, Personal History of Psychological Trauma, Partner Violence, Parental Child Neglect, Discord with Social Services, and Antisocial Personality Disorder with additional histrionic, borderline and paranoid traits." Sylivant reported respondent-mother also had "a number of problematic personality traits," which would not likely be ameliorated by psychotherapy or medication. Sylivant reported that respondent-mother's prognosis for significant and lasting behavior change was "poor."

¶ 14 Respondent-father was released from incarceration on 20 June 2019; however, he was reincarcerated on 27 June 2019 for trafficking in heroin. Shortly thereafter, a social worker met with respondent-father at the Wilson County Detention Center on 10 July 2019 to create a family contact and visitation plan. Respondent-father requested a visit with Karl, but face-to-face meetings during respondent-father's incarcerations were never allowed based on a determination that a meeting at the jail was not in Karl's best interests.

¶ 15 In the August 2019 permanency-planning orders, the court set custody with a relative or other suitable caregiver as the primary permanent plans for Jake and Karl with a secondary, concurrent plan of reunification. For Pamela, the permanent plan was reunification with a concurrent plan of custody with a relative or other suitable person. Respondent-mother was permitted supervised visitation with the juveniles every other week and supervised telephone calls at least weekly. Respondent-father was allowed mail correspondence and supervised telephone contact with Karl.

¶ 16 The trial court conducted permanency-planning hearings on 20 November 2019 and 4 March 2020 and entered permanency-planning orders on 13 December 2019 and 31 March 2020. In the December 2019 orders, the court noted "concerns that" respondent-mother "was having unsupervised contact" with Karl. Karl's kinship placement had been unsuccessful, and DSS had placed Karl with a foster family. The court ceased respondent-mother's contact with the juveniles until she "exhibited behavioral changes, made progress towards her Family Service Agreement, and complied with her signed family contact and visitation plan." In the March 2020 orders, the court noted that respondent-mother remained homeless and unemployed. Meanwhile, respondent-father had had no contact with Karl since the last permanency-planning hearing. The court changed Jake's and Karl's primary permanent plan to adoption with parental reunification as a concurrent plan.

¶ 17 Following the next hearing on 22 June 2020, the court entered permanency-planning orders on 22 July 2020 finding that respondent-mother had made "minimal progress towards her court ordered activities" involving emotional and mental health issues and substance abuse. The primary permanent plan for Pamela was also changed to adoption with a concurrent plan of reunification with her father.

¶ 18 DSS filed motions and petitions to terminate respondent-mother's parental rights to Jake, Karl, and Pamela and respondent-father's parental rights to Karl on 22 September 2020. DSS alleged that respondent-mother's parental rights could be terminated under N.C.G.S. § 7B-1111 for abuse or neglect; willfully leaving the juveniles in placement outside of the home without showing reasonable progress in correcting those conditions which led to the removal of the juveniles; willful failure to pay a reasonable portion of the cost of care for the juveniles; dependency; and willful abandonment. DSS alleged the same as grounds to terminate respondent-father's parental rights to Karl.

¶ 19 The court entered amended permanency-planning orders for each juvenile on 25 November 2020, following a fifth permanency-planning

hearing on 23 September 2020, and permanency-planning orders on 12 February 2021, following a sixth hearing on 20 January 2021. In its final permanency-planning order related to Karl, the court found that respondent-mother had made "minimal progress" since the last permanency-planning hearing and that respondent-father would remain incarcerated until August 2024.

¶ 20 A hearing on DSS's motions to terminate respondent-mother's parental rights to the juveniles and respondent-father's parental rights to Karl was held on 18, 19, and 22 March and 26 April 2021. In orders entered on 25 May 2021, the trial court adjudicated the existence of grounds to terminate respondent-mother's parental rights to Jake, Karl, and Pamela pursuant to N.C.G.S. § 7B-1111(a)(1)–(3) and (6). The court also adjudicated the existence of grounds to terminate respondent-father's parental rights to Karl pursuant to N.C.G.S. § 7B-1111(a)(1), (2), (6), and (7). In the disposition part of the orders, the court determined that it was in the best interests of each juvenile to terminate respondent-mother's parental rights, and that it was in the best interests of Karl to terminate respondent-father's parental rights. Accordingly, the trial court terminated respondent-mother's parental rights to Jake, Karl, and Pamela and respondent-father's parental rights to Karl. Respondent-mother and respondent-father separately appeal from the 25 May 2021 termination orders.

II. Analysis

A. Respondent-Mother's Competency

¶ 21 **[1]** Respondent-mother argues that the trial court erred by failing to appoint a guardian ad litem to aid her, pursuant to N.C.G.S. § 7B-1101.1, after her competency was brought into question. Following the first review hearing, the trial court noted that respondent-mother was suffering from mental illness and that she was not consistent in receiving mental health treatment. Respondent-mother contends that her behavior during the hearing to terminate her parental rights, in which she exhibited "little or no understanding" as to why her children were in DSS custody, should have caused the court to inquire into her competency.

¶ 22 Section 7B-1101.1 states that "the court may appoint a guardian ad litem for a parent who is incompetent in accordance with G.S. 1A-1, Rule 17." N.C.G.S. § 7B-1101.1(c) (2021). For the purposes of Rule 17, an "incompetent adult"

> is an adult "who lacks sufficient capacity to manage the adult's own affairs or to make or communicate

> important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, intellectual disability, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition."

In re N.K., 375 N.C. 805, 809–10 (2020) (quoting N.C.G.S. § 35A-1101(7) (2019)).

¶ 23 "[A] trial judge has a duty to properly inquire into the competency of a litigant in a civil trial or proceeding when circumstances are brought to the judge's attention [that] raise a substantial question as to whether the litigant is *non compos mentis*." *In re T.L.H.*, 368 N.C. 101, 106 (2015) (second alteration in original) (quoting *In re J.A.A.*, 175 N.C. App. 66, 72 (2005)). Though the nature and extent of diagnoses by mental health professionals are exceedingly important to the proper resolution of a competency determination, a court may also consider

> the manner in which the individual behaves in the courtroom, the lucidity with which the litigant is able to express himself or herself, the extent to which the litigant's behavior and comments shed light upon his or her understanding of the situation in which he or she is involved, the extent to which the litigant is able to assist his or her counsel or address other important issues, and numerous other factors.

Id. at 108. Thus, much of the information pertinent to a competency determination is not discernible from a review of a trial record. *Id.* We review a court's decision to inquire into a parent's competency as well as a decision to appoint a parental guardian ad litem due to the parent's incompetence for abuse of discretion. *Id.* at 106. When the record on appeal "contains an appreciable amount of evidence tending to show that the litigant whose mental condition is at issue is not incompetent, the trial court should not, except in the most extreme instances, be held on appeal to have abused its discretion by failing to inquire into that litigant's competence." *Id.* at 108–09; *see In re Q.B.*, 375 N.C. 826, 834, 838 (2020) (affirming a termination of parental rights although the court did not inquire about the respondent's mental competence when the record presented sufficient indicia of her understanding of the nature of the proceedings, including that she comprehended her role therein, and could assist her attorney in preparing the case); *In re N.K.*, 375 N.C. at 812 (holding the trial court did not abuse its discretion by not inquiring about the respondent's need for a guardian ad litem where the court had "ample opportunity to gauge [her] competence" by observing her

behavior during pre-adjudicatory, adjudicatory, and dispositional hearings, subsequent review and permanency-planning hearings, and the termination-of-parental-rights hearing).

¶ 24 Here the record reflects that respondent-mother was in court during the juveniles' adjudication and disposition hearings, the review hearing, five permanency-planning hearings, and three of the four days of the termination of parental rights hearing. During the adjudication hearing on the juvenile petitions, with the assistance of counsel, respondent-mother entered stipulations and denied some allegations. In its juvenile disposition order, the court made a finding reflecting respondent-mother's denial of any need for mental health treatment. By the time of the first review hearing, respondent-mother had made progress on her case plan. She also participated in a psychological evaluation, which opined that her intelligence "appear[ed] sufficient, as evidenced by her vocabulary, reading ability, and manipulations."

¶ 25 Respondent-mother contends that her testimony during the termination-of-parental-rights hearing did not demonstrate an understanding of how her mental health, domestic violence, criminal conduct, homelessness, and substance abuse issues affected her parenting or why she needed to comply with her case plan and court orders. But her testimony reflects her efforts to obtain help caring for the children and to provide Karl with therapy, as well as her attendance at parenting classes. She also testified that she had attended every court hearing and participated in child family team meetings so that she could be reunited with her children. The transcript also captures respondent-mother's repeated extemporaneous interjections during the termination proceedings. The substance of her interjections, often challenging witness testimony, demonstrates her clear understanding of the specific issues being discussed and her goal of obtaining custody of her children.

¶ 26 The record shows that the court had ample opportunity to observe respondent-mother's behavior and that she understood the nature of the proceedings up to and including the termination hearing, comprehended her role in them, and could assist her attorney in preparing her case. *See In re Q.B.*, 375 N.C. 826; *In re N.K.*, 375 N.C. 805. Therefore, the trial court did not abuse its discretion by not conducting an inquiry into respondent-mother's competency. *See In re T.L.H.*, 368 N.C. at 108–09.

B. Adjudication of Grounds to Terminate Respondent-Father's Parental Rights

¶ 27 **[2]** Respondent-father argues the trial court failed to adequately support its conclusions that grounds existed to terminate his parental rights

to Karl. He challenges each of the court's four adjudicated grounds. We address respondent-father's argument regarding willful abandonment.

¶ 28 "We review a trial court's adjudication under N.C.G.S. § 7B-1111 'to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law.' " *In re E.H.P.*, 372 N.C. 388, 392 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111 (1984)). Unchallenged findings of fact "are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407 (2019) (citing *Koufman v. Koufman*, 330 N.C. 93, 97 (1991)).

¶ 29 A trial court may terminate parental rights when "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition." N.C.G.S. § 7B-1111(a)(7) (2021). "Although the trial court may consider a parent's conduct outside the six-month window in evaluating a parent's credibility and intentions, the 'determinative' period for adjudicating willful abandonment is the six consecutive months preceding the filing of the petition." *In re N.D.A.*, 373 N.C. 71, 77 (2019) (quoting *In re D.E.M.*, 257 N.C. App. 618, 619 (2018)). "Whether a biological parent has a willful intent to abandon his child is a question of fact to be determined from the evidence." *In re B.C.B.*, 374 N.C. 32, 35 (2020) (quoting *In re Adoption of Searle*, 82 N.C. App. 273, 276 (1986)). "Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." *Id.* (quoting *In re Young*, 346 N.C. 244, 251 (1997)). We have noted that abandonment is evident when a parent "withholds his presence, his love, his care, the opportunity to display filial affection, and wil[l]fully neglects to lend support and maintenance." *Pratt ex rel. Graham v. Bishop*, 257 N.C. 486, 501 (1962).

¶ 30 "Although a parent's options for showing affection while incarcerated are greatly limited, a parent will not be excused from showing interest in his child's welfare by whatever means available." *In re A.J.P.*, 375 N.C. 516, 532 (2020) (cleaned up). "As a result, our decisions concerning the termination of the parental rights of incarcerated persons require that courts recognize the limitations for showing love, affection, and parental concern under which such individuals labor while simultaneously requiring them to do what they can to exhibit the required level of concern for their children." *In re A.G.D.*, 374 N.C. 317, 320 (2020) (citing *In re K.N.*, 373 N.C. 274, 283 (2020)).

¶ 31 Here the trial court supported the adjudication of grounds to terminate respondent-father's parental rights via the following findings of fact:

35. A court previously determined [respondent-father] to be the father of the Juvenile on or about April 3, 2012. [Respondent-father] is now listed on the Juvenile's birth certificate.

36. [Respondent-father] was in jail at the time of the Adjudication, and with the exception of a very short period, [he] has been incarcerated the entire time [Karl] has been in the Department's care. [Respondent-father] is not scheduled to be released until August 2024.

37. [Respondent-father] has participated in some of the child and family teams meetings via phone.

38. Prior to the Juvenile Petition, [respondent-father] had not been active in [Karl's] life, and during the majority of the Juvenile case, [he] has made little to no effort to have a relationship with [Karl].

39. Up until the September 23, 2020 Permanency Planning Hearing, [respondent-father] was permitted to contact [Karl] by phone or write him letters; however he never called [Karl] and never wrote to him. Even from December 2018 to October 2019, when [Karl] was placed with . . . a kinship placement [respondent-father] knew, he still failed to contact [Karl]. On September 23, 2020 as no phone contact had been occurring, the court ordered any contact between [respondent-father] and [Karl] to take place via mail, however, [respondent-father] did not send any letters or cards to [Karl].

40. During the course of this case, [respondent-father] has provided no support, no letters, no phone calls, and no gifts to [Karl] during the past two years.

41. [Respondent-father] voluntarily decided not to be brought to the third day of the trial, and he requested to leave early on the fourth day.

42. By failing to make even minimal efforts to have a relationship with his son, [respondent-father]

willfully failed to show love, support, and affection for [Karl] during this case.

. . . .

B. [Respondent-father] has willfully abandoned the child for at least six consecutive months immediately preceding the filing of the petition.[4]

¶ 32 Respondent-father challenges the evidentiary support for findings of fact 37, 39, 40, and 41. He also contends the trial court's findings are insufficient to support the conclusion that grounds existed to terminate his parental rights for willful abandonment.

¶ 33 Respondent-father argues that finding of fact 37 is erroneous because no evidence was presented, and the trial court made no findings, regarding when he attended Child and Family Team meetings and if his attendance occurred during the determinative six-month period. The petition to terminate parental rights was filed on 22 September 2020; thus, the determinative six-month period is from 22 March to 22 September 2020. No evidence suggests respondent-father attended any meetings during the determinative period. As respondent-father noted, in the sixth permanency-planning order, the trial court found that respondent-father had participated in a Child and Family Team meeting on 3 November 2020. While the trial court should have made findings concerning the dates of respondent-father's participation in the Child and Family Team meetings, any possible error is harmless because the evidence indicates his participation fell outside of the determinative period. *In re J.D.C.H.*, 375 N.C. 335, 342 (2020).

¶ 34 Respondent-father asserts "there was no evidence offered at the termination adjudication hearing to support" the portions of findings of fact 39 and 40 indicating that he never called Karl or provided gifts. Respondent-father acknowledges social workers' testimony that they were not aware of him ever calling Karl or sending Karl any gifts, but

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4. While respondent-father also asserts that the trial court failed to make any findings specifically addressing the determinative six-month period, the trial court determined that respondent-father "has willfully abandoned the child for at least six consecutive months." Although this determination is labeled as a conclusion of law, regardless of how this determination is classified, "that classification decision does not alter the fact that the trial court's determination concerning the extent to which a parent's parental rights in a child are subject to termination on the basis of a particular ground must have sufficient support in the trial court's factual findings." *In re N.D.A.*, 373 N.C. at 76–77. As a result, we determine that respondent-father's assertion is erroneous, and we consider the extent to which the evidentiary findings support the ultimate findings and conclusions below.

he contends that "[n]ot being aware of something is not evidence that it did not happen." Respondent-father's argument relies upon *In re V.M.F.*, 209 N.C. App. 204, 2011 N.C. App. Lexis 105, at *7 (2011) (unpublished), which he asserts "has precedential value to a material issue in the instant case and there is no published opinion that would serve as well." Respondent-father's reliance on *In re V.M.F.* is misplaced, and because the case is readily distinguishable, we reject any argument that it has precedential value.

¶ 35 At issue in *In re V.M.F.* was whether there was support for the finding that the respondent's attempt at legitimating his child occurred only after the filing of the petition to terminate his parental rights. *Id.* at *6–7. The petitioner, the child's mother, had sought to establish that the respondent had filed an affidavit of paternity after the termination petition. *Id.* at *4–5. At the adjudication hearing, the respondent submitted evidence to establish that the affidavit was filed before the termination petition. *Id.* at *7. Instead of presenting any evidence to the contrary, the petitioner testified "that she was not 'aware' of [the] respondent's filing of an affidavit of paternity prior to the filing of the petition and that she thought she became 'aware' of the affidavit after the first court hearing." *Id.* The Court of Appeals concluded that this testimony could not establish that the respondent filed the affidavit after the filing of the termination petition, and "[g]iven the absence of any other evidence" indicating such, the trial court's finding was not supported by clear, cogent, and convincing evidence. *Id.*

¶ 36 Here, the only testimony concerning whether respondent-father ever called Karl or provided any gifts was offered by the social workers on behalf of DSS. It was respondent-father who failed to present any evidence to the contrary. Moreover, the trial court did not rely solely upon the social workers' testimony to support its finding. The orders from the prior permanency-planning hearings were admitted into evidence and considered by the court. In the first permanency-planning order, entered on 30 August 2019, the trial court permitted monitored written and supervised telephone communication between respondent-father and Karl. In each of the following four permanency planning orders, the court found there had "been no telephone contact or mail exchanges."

¶ 37 It is well established that the trial court has the duty to determine the weight and veracity of evidence and the reasonable inferences to be drawn therefrom. *E.g.*, *In re D.L.W.*, 368 N.C. 835, 843 (2016). It was reasonable for the trial court to find that respondent-father had never called Karl or provided him with any gifts. Findings of fact 39 and 40 are supported by clear, cogent, and convincing evidence.

¶ 38 Respondent-father argues there is no evidence to support the portion of finding of fact 41 that states he requested to leave early on the fourth day of the termination hearing. We agree. Thus, we disregard that portion of the finding. *In re N.G.*, 374 N.C. 891, 901 (2020).

¶ 39 Respondent-father further contends that the trial court failed to make sufficient findings to establish that his conduct was willful, citing the Court of Appeals' decision *In re D.M.O.*, 250 N.C. App. 570, 578 (2016). He asserts that the court here failed to make findings related to his ability "to perform the conduct underlying its conclusion." He argues that "the trial court's permission to call or write does not mean that [he] had the ability or capacity to take those actions while he was incarcerated." He asserts that his conduct did "not manifest a willful determination to forego all parental duties and relinquish all parental claims to Karl," because he "was present at most of the hearings," he once requested in-person visitation, he requested telephone communication after the trial court had rescinded that option, and he had expressed a desire to "step up and be a father to his child upon his release." We disagree.

¶ 40 The majority of the evidence respondent-father mentions falls outside the determinative six-month period. Thus, the trial court was permitted, but not required, to consider that evidence in determining respondent-father's credibility and intentions. *In re N.D.A.*, 373 N.C. at 77. Respondent-father's statement related to his desire to parent Karl was introduced at the adjudication hearing, through the testimony of a social worker reading from the initial disposition order. This order was entered on 4 March 2019, a year before the start of the determinative period. Respondent-father requested in-person visitation on 10 July 2019, eight months preceding the beginning of the determinative period. "[M]ost of the hearings" respondent-father referred to occurred before the determinative period: he was present at the initial adjudication and disposition hearing held on 20 February 2019, the review hearing held on 20 March 2019, and the permanency-planning hearings held on 31 July 2019, 20 November 2019, and 4 March 2020. He was not present at the permanency-planning hearing held on 22 June 2020, that took place during the determinative period, or at the two hearings held on 23 September 2020 and 20 January 2021, after the determinative period. Following the 23 September 2020 hearing, the trial court revoked respondent-father's right to contact Karl by telephone. Respondent-father requested at the 3 November 2020 Child and Family Team meeting that telephone contact be reinstated, and in the order entered after the 20 January 2021 permanency-planning hearing, the court allowed additional contact outside of mail exchange "in the discretion of [DSS] after consulting with the juvenile and the juvenile's therapist."

¶ 41 The trial court's findings report that respondent-father "voluntarily decided" not to attend the third day of the termination hearing, which respondent-father argues is not an indication of abandonment. Regardless, as with the evidence cited by respondent-father, the court was free to consider respondent-father's request to be excused from attending the hearing that day "in evaluating [his] credibility and intentions." *In re N.D.A.*, 373 N.C. at 77 (quoting *In re D.E.M.*, 257 N.C. App. at 619). In a colloquy with the trial court, respondent-father indicated he preferred to work his job assignment at the detention center rather than to attend the third day of the hearing.

¶ 42 Respondent-father's argument that the court was required to make findings related to his ability to communicate with Karl is misplaced. The Court of Appeals' decision in *In re D.M.O.* is neither binding on this Court nor applicable to the instant case. The respondent in *In re D.M.O.* was incarcerated intermittently during the course of the case, including for approximately five months of the determinative period. 250 N.C. App. at 575. To support its conclusion that the respondent willfully abandoned her child, the trial court found that during the determinative period the respondent failed to attend the child's sports games, failed to voluntarily visit her child or attend court-ordered visitations, claimed that she sent two letters, sent "a small number of" text messages during the periods she was not incarcerated, and "made attempts to call." *Id.* at 573–75. The Court of Appeals concluded these findings were insufficient because the trial

> court never made findings addressing how [the respondent's] periodic incarceration at multiple jails, addiction issues, or participation in a drug treatment program while in custody might have affected her opportunities to request and exercise visitation, to attend games, or to communicate with [the child]. The trial court made no findings establishing whether [the respondent] had made any effort, had the capacity, or had the ability to acquire the capacity, to perform the conduct underlying its conclusion that [the respondent] abandoned [the child] willfully.

Id. at 578.

¶ 43 Here, the trial court identified the "minimal efforts" that respondent-father could have made while incarcerated to have a relationship with his son: communicating with Karl by telephone or through mail by sending letters, cards, or gifts. Unlike *In re D.M.O.*, the trial

court here looked to see if respondent-father took actions that were available to him while he was incarcerated and made findings that he failed to make any efforts at communication. The court's findings indicate that respondent-father never called Karl and never sent a letter, card, or gift while Karl was in DSS care. While respondent-father was aware of the actions he could take, the evidence and the findings of fact indicate that he was unwilling "to take any action whatsoever to indicate that he had any interest in preserving his parental connection with" Karl. *In re A.G.D.*, 374 N.C. 317, 327 (2020). A social worker supervisor testified that she was unaware of any attempts by respondent-father to obtain the contact information for Karl's placements, and the trial court allowed flexibility for telephone contact outside the specified times "as agreed upon by the caretaker." Once the trial court revoked telephone communication, respondent-father requested it be reinstated because he "did not want to write any letters."

¶ 44 The trial court's findings of fact support the ultimate findings and conclusion that respondent-father willfully abandoned Karl during the six months preceding the filing of the petition. *See In re M.S.A.*, 377 N.C. 343, 2021-NCSC-52, ¶¶8, 12 (concluding that the respondent's failure to utilize "whatever means available" to him to maintain a relationship with his child while he was incarcerated amounted to willful abandonment); *In re K.N.K.*, 374 N.C. 50, 54–55 (2020) (concluding that termination was justified based on willful abandonment when the respondent had no contact with the minor child, provided no financial support, and sent no cards, gifts, or other tokens of affection not only during the determinative six-month period, but at any point during the approximately three years preceding the filing of the termination petition).

¶ 45 Thus, we conclude that the trial court did not err in adjudicating grounds to terminate respondent-father's parental rights for willful abandonment. *See* N.C.G.S. § 7B-1111(a)(7). Because an adjudication of one ground is sufficient to support a termination of parental rights, we do not address respondent-father's arguments challenging alternative grounds. *E.g.*, *In re A.R.A.*, 373 N.C. 190, 194 (2019).

C. Disposition Based On the Juvenile's Best Interests

¶ 46 At the dispositional stage of a proceeding to terminate parental rights, the trial court must "determine whether terminating the parent's rights is in the juvenile's best interests." N.C.G.S. § 7B-1110(a) (2021). In making its determination,

> [t]he court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801,

> that the court finds to be relevant, reliable, and necessary to determine the best interests of the juvenile. In each case, the court shall consider the following criteria and make written findings regarding the following that are relevant:
>
> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

Id.

¶ 47 "The trial court's dispositional findings are binding on appeal if supported by the evidence received during the termination hearing or not specifically challenged on appeal." *In re K.N.L.P.*, 380 N.C. 756, 2022-NCSC-39, ¶ 11 (citing *In re S.C.C.*, 379 N.C. 303, 2021-NCSC-144, ¶ 22). "The trial court's ultimate determination regarding the child's best interests is reviewed for abuse of discretion and will be reversed only if it is 'manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *In re N.B.*, 379 N.C. 441, 2021-NCSC-154, ¶ 11 (quoting *In re T.L.H.*, 368 N.C. at 107).

1. Respondent-Mother

¶ 48 **[3]** Respondent-mother argues that the trial court abused its discretion in determining that termination of her parental rights was in Karl's best interests.[5] She challenges the court's findings of fact and its weighing of factors.

¶ 49 The trial court found that Karl had been in placement outside of the home for over two years, "but to date no long term placement ha[d] been identified" for him. The court further found that if Karl is free for

5. Respondent-mother does not contest the trial court's determination that it is in the best interests of Jake and Pamela to terminate her parental rights.

adoption, "it is possible once additional resources are available and used he would be adopted." The court's additional findings included the following: While it was clear that Karl loved respondent-mother, as the case progressed, "a level of mistrust" had developed between Karl and his parents, "especially his mother." Karl was placed at a residential psychiatric treatment facility and had "been participating in therapy and [was] working to process his trauma and how to move forward." Karl spoke with respondent-mother over the telephone near the time of the termination hearing and "explained to her how frustrated he was that she would not do what she needed to do to work her plan." After the phone call, Karl contacted his DSS social worker and explained that "he recognized his mother ha[d] not done all she need[ed] to do to get him out of foster care, and he asked [the social worker] to find him a forever home." It was not in Karl's best interest to return to respondent-mother's home. Although Karl had behavioral issues, he was "working with [DSS] and his placement to help work through those issues and move forward. [Karl] wants to find a forever home, one that accepts him for him."

¶ 50 In accordance with the statutory factors listed in N.C.G.S. § 7B-1110(a), the trial court made the following findings in finding of fact 8:

> A. The age of the juvenile: [Karl] is 9 years old.
>
> B. The likelihood of adoption of the Juvenile: It is feasible once [Karl] becomes free for adoption he will be adopted, as he has a strong desire to find a forever home and [DSS] can utilize additional resources to explore adoptive placements. Moreover, [Karl] is making progress in therapy to help address his behaviors, and it is anticipated this progress will continue.
>
> C. Whether the termination of parental rights will aid in the accomplishment of the permanent plan for [Karl]: The current plan for [Karl] is adoption. Said plan cannot be completed and fully implemented unless the parental rights of the mother and father are terminated. Once [Karl] is cleared for adoption more resources will become available for [DSS] and [Karl] to aid in finding his forever home.
>
> D. The bond between the Juvenile and the parent: [Karl] has a significant bond with his mother; however, [Karl] is realizing the negative impact

> his mother has on him. [Respondent-mother] often blamed [Karl] for [DSS]'s involvement, and she refused to support him in a number of his interests. . . . There is a level of mistrust between [Karl] and his parents, especially his mother.
>
> E. The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement: Although [Karl] is not in a pre-adoptive home, he is open and willing to be adopted. He is doing well in his structured placement, and he wants to find a family he can call his own and never have to move again.
>
> F. Any other relevant matters and considerations: [Karl] wants [his DSS social worker] to find him a forever home. [Karl] wants and needs permanency and stability, and the best way to achieve that is through adoption.

¶ 51 Respondent-mother challenges finding of fact 8.D. as minimizing the bond between Karl and herself. She contends that he is protective of her and that as the social worker testified, if respondent-mother complied with her case plan, Karl wanted to return to her home. Respondent-mother contends that the trial court relied too heavily on Karl's statements about this frustration with her.

¶ 52 During the disposition phase, a DSS social worker testified that Karl expressed

> how he was upset with [respondent-mother], that he ha[d] been in care for a very long time, and he did not understand why she was not doing what she needed to do in order for him to go home. . . . [H]e also stated that he was ready to move forward and he actually mentioned an adoptive home.
>
> . . . .
>
> Even though he's the child, he would be very protective over her. And he's never hid the fact that he wanted to go home. But in that conversation, he shared with me that he was over it. That he was ready to leave foster care, and that he felt like there were a

> lot of people . . . that was [sic] willing to help her and she did not take the help.

¶ 53 The record supports the finding that a significant bond existed between Karl and respondent-mother and the inferences that he realized the negative effect respondent-mother's behavior was having on him and that he was developing a mistrust of respondent-mother. *See In re A.A.M.*, 379 N.C. 167, 2021-NCSC-129, ¶ 22 ("We note that '[i]f different inferences may be drawn from the evidence, [the trial judge] determines which inferences shall be drawn and which shall be rejected.' " (alterations in original) (quoting *Knutton v. Cofield*, 273 N.C. 355, 359 (1968)). We overrule respondent-mother's challenge.

¶ 54 Respondent-mother also challenges the finding that termination of parental rights in Karl would make his adoption feasible, even with the additional resources available to DSS, such as stated in findings of fact 8.B. and C. Respondent-mother contends that Karl's "severe behavioral issues and mental health problems" suggest "strongly" that he "was not a candidate for adoption." She points to his history of seventeen placements during twenty-eight months of DSS custody; his diagnoses with oppositional defiant disorder, adjustment disorder with depressed mood, conduct disorder, post-traumatic stress disorder, and ADHD, and his reported visual and auditory hallucinations; and his treatment at a psychiatric residential treatment hospital at the time of the termination proceeding. Respondent-mother contends that Karl was not going to be back in a foster home "any time soon, and the court's finding that termination would pave the way for DSS to place him for adoption was unsupported."

¶ 55 The record reflects that Karl came into DSS custody on 11 December 2018. His seventeen placements, including hospitalizations, included two placements that lasted for several months each. He was in a kinship placement from 21 December 2018 through October 2019 and in a therapeutic foster placement from October 2019 until September 2020. Between September 2020 and December 2020, he was placed with another therapeutic foster family, had a relative placement, and was hospitalized three times before being admitted to the psychiatric residential treatment hospital in December 2020. He remained in the psychiatric hospital through the date of the disposition hearing conducted on 26 April 2021. During the disposition hearing, Karl's DSS social worker testified that he was "doing great" at the psychiatric hospital. He had been recognized as making progress on his therapeutic goals for the prior twelve weeks, including having no incidents of defying authority figures, and he had been getting along with peers, following the rules and policies

of placement, attending school, and meeting with his therapist. His history of one relative placement and one therapeutic placement, which both lasted almost a year showed that Karl could maintain a placement. When he expressed that he did not understand why respondent-mother had not taken the steps she needed to accomplish in order for him to come home and that he was ready to move forward toward an adoptive home, his social worker described this as a "[h]uge" step for him. The social worker further related that Karl was "doing great" at school and "as long as his home environment is stable, there are no concerns regarding his academics." The social worker explained that if the court terminated respondents' parental rights to Karl, DSS would register him on NC Kids—a national, adoptive website—as well as make contact with adoption recruiter agencies and licensed foster parents within DSS. The social worker, who had twelve years of experience, affirmed her belief that there is "a likelihood" that Karl "could be adopted."

¶ 56 The court's findings that "[o]nce [Karl] is cleared for adoption more resources will become available for [DSS] and [Karl] to aid in finding his forever home," and that "it is feasible . . . [Karl] will be adopted," as stated in findings of fact 8.B. and C., are supported by the record. *See Knutton*, 273 N.C. at 359. Respondent-mother's challenge is overruled.

¶ 57 Respondent-mother argues that the termination of her parental rights will result in the permanent deprivation of the "care of the most consistent adult in [Karl's] life and the person that he most wanted to be with." Claiming that "Karl was unlikely to be adopted," she asserts the trial court abused its discretion in terminating her parental rights; however, respondent-mother's unsupported assertion is insufficient to establish an abuse of discretion. *See generally In re K.N.L.P.*, 2022-NCSC-39, ¶ 26 ("We . . . have repeatedly recognized that 'the bond between parent and child is just one of the factors to be considered under N.C.G.S. § 7B-1110(a), and the trial court is permitted to give greater weight to other factors.' " (quoting *In re Z.L.W.*, 372 N.C. 432, 437 (2019)). The trial court's order reflects its consideration of the dispositional factors set out in N.C.G.S. § 7B-1110(a)(1)–(5), as well as other relevant circumstances as allowed under N.C.G.S. § 7B-1110(a)(6) and indicates that the court performed a reasoned analysis weighing those factors. *See In re N.B.*, 2021-NCSC-154. The determination to terminate respondent-mother's parental rights to Karl appears neither manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision, and "this Court lacks the authority to reweigh the evidence." *In re A.U.D.*, 373 N.C. 3, 12 (2019).

2. Respondent-Father

¶ 58 **[4]** Respondent-father does not challenge the trial court's dispositional findings of fact, but he asserts the court abused its discretion in determining termination of his parental rights was in Karl's best interests. Relying on *In re J.A.O.*, 166 N.C. App. 222 (2004), respondent-father asserts that Karl's lack of a prospective adoptive placement, based in part on his "many mental and medical issues," and the benefits of Karl continuing a legal relationship with his natural relatives, require reversal of the trial court's determination.

¶ 59 We find this case to be distinguishable from *In re J.A.O.* At the time of the termination hearing in that case, J.A.O. was "a troubled" fourteen-year-old who had been shuffled through multiple treatment centers due to his significant physical, mental, and behavioral disorders, yet showed no signs of improvement. *Id.* at 227. But the respondent-mother was "connected to and interested in" him, and she had made progress in correcting the conditions that led to the juvenile's removal from her care. *Id.* at 227–28. The guardian ad litem argued J.A.O. was unlikely to be a candidate for adoption and that termination was not in his best interests because it would "cut him off from any family that he might have." *Id.* at 226–27. Under these exceptional circumstances, the Court of Appeals concluded that the trial court had abused its discretion in terminating the respondent's parental rights. *Id.* at 227–28.

¶ 60 As noted above, Karl was nine years old at the time of the termination hearing, and though he was residing in a psychiatric residential treatment facility, he was making progress on his therapeutic goals. His history of some placements lasting nearly a year showed that he would be capable of maintaining a long-term placement, his social worker believed there was a possibility he would be adopted; and once he was available for adoption, DSS would be able to engage more resources to find him a permanent placement. While respondent-father seems to believe Karl would still be without a permanent placement by the time respondent-father was released from prison in 2024, three years after entry of the trial court's order, there is no evidence to support such a conclusion. Moreover, unlike the respondent in *In re J.A.O.*, respondent-father has no relationship with Karl. As we concluded above, the trial court's adjudication of willful abandonment is predicated on respondent-father's failure to "take any action whatsoever to indicate that he had any interest in preserving his parental connection with" Karl. *In re A.G.D.*, 374 N.C. at 327. Though respondent-father touts "the stabilizing influence" and "sense of identity" Karl obtains from natural relatives, neither benefit is supplied by respondent-father. His social worker testified that

while Karl had no relationship with respondent-father, he maintained contact with his siblings and his former relative placement.

¶ 61 Accordingly, we conclude that the trial court properly considered the statutory factors set forth in N.C.G.S. § 7B-1110(a) and did not abuse its discretion by determining that termination of respondent-father's parental rights was in Karl's best interests. *See In re H.A.J.*, 377 N.C. 43, 2021-NCSC-26, ¶33.

III. Conclusion

¶ 62 The trial court did not abuse its discretion by not conducting an inquiry into respondent-mother's competency. *See In re T.L.H.*, 368 N.C. at 108–09. Respondent-mother does not challenge the adjudication of grounds to terminate her parental rights, and the trial court's findings of fact and conclusions of law support its adjudication of grounds to terminate respondent-father's parental rights for willful abandonment. The trial court did not abuse its discretion in determining that it was in Karl's best interests to terminate both respondents' parental rights. Thus, we affirm the trial court's 25 May 2021 orders terminating respondent-mother's parental rights to Jake, Karl, and Pamela and respondent-father's parental rights to Karl.

AFFIRMED.

IN THE MATTER OF J.C.J. AND J.R.J.

No. 288A21

Filed 15 July 2022

1. Termination of Parental Rights—grounds for termination—failure to pay a reasonable portion of the cost of care—gifts—notice

The trial court did not err by concluding that respondent-parents' parental rights in their children were subject to termination on the grounds of failure to pay a reasonable portion of the cost of the care that the children received in foster care where the parents sporadically provided the children with gifts, clothing, and diapers during the determinative six-month period but failed to make any payment to the department of social services or to the foster parents. Further, the absence of a court order, notice, or knowledge could not

serve as a defense to the parents' failure to support their children. Finally, because the trial court found that the father was consistently employed at the same job throughout the pendency of the case (the mother remained unemployed), it was not required to make specific findings concerning the six-month determinative period.

2. Termination of Parental Rights—best interests of the child—factual findings—evidentiary support

The trial court did not abuse its discretion in determining that it would serve the best interests of the children to terminate respondent-parents' parental rights where the court properly considered and made findings regarding the dispositional factors in N.C.G.S. § 7B-1110(a)—including that disrupting the routine and services established during the children's foster care would be needlessly detrimental and that the children lacked a strong bond with their parents—which had sufficient evidentiary support. There was no basis for the use of a "least restrictive disposition" test in this state, as suggested by respondent-parents.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 22 October 2020 and 20 May 2021 by Judge Regina R. Parker in District Court, Beaufort County. This matter was calendared for oral argument in the Supreme Court on 1 July 2022, but was determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

J. Edward Yeager, Jr., for petitioner-appellee Beaufort County Department of Social Services.

Peter Wood for respondent-appellant father.

Benjamin J. Kull for respondent-appellant mother.

Matthew D. Wunsche, GAL Appellate Counsel, for North Carolina Guardian Ad Litem Program, amicus curiae.

ERVIN, Justice.

¶ 1 Respondent-mother Courtney J. and respondent-father Jeremy J. appeal from orders entered by the trial court terminating their parental

rights in their twin sons J.C.J. and J.R.J.[1] After careful consideration of the parents' challenges to the trial court's termination orders in light of the record and the applicable law, we conclude that the trial court's termination orders should be affirmed.

¶ 2 Jaden and Jack, who are twins, were born in July 2015 and have five older half-siblings.[2] On 23 October 2017, the Beaufort County Department of Social Services obtained the entry of orders placing the twins in nonsecure custody and filed juvenile petitions alleging that they were neglected juveniles. In these petitions, DSS alleged that the twins resided in an injurious environment and received improper care, supervision, and discipline. DSS further alleged that it had received nineteen child protective service reports relating to the family since March 2013 based upon concerns relating to the adequacy of the supervision and discipline that the older children had received, the adequacy of the medical care that had been provided to these children, parental substance abuse, and the children's exposure to sexual conduct. On 9 September 2017, DSS alleged that it had received a child protective services report describing "child on child sexual abuse occurring in the home" involving two of the twins' half-siblings, with four of the twins' half-siblings having previously been found to be neglected based primarily upon respondent-mother's failure to take advantage of the remedial services that she had been offered. Finally, DSS alleged that the twins' speech development was delayed and that, even though a social worker had recommended that they receive speech therapy, respondent-mother had refused to ensure that they received such therapy on the grounds that she did not need assistance in "keeping up with the children's appointments and/or raising her children."

¶ 3 After a hearing held on 11 April 2018, Judge Darrell B. Cayton, Jr., entered an order on 12 April 2018 determining that the twins were neglected juveniles. In light of this determination, Judge Cayton ordered respondent-mother to continue to comply with the terms of an Out of Home Family Services Agreement; continue to attend the Families Understanding Nurturing Program; continue to receive therapeutic treatment at Pamlico Counseling; participate in family therapy when recommended by her own and the twins' therapists; attend all available

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1. J.C.J. and J.R.J. will be referred to throughout the remainder of this opinion as "Jaden" and "Jack," respectively, which are pseudonyms used for ease of reading and to protect the identities of the juveniles.

2. In view of the fact that the parental rights of the twins' half-siblings were not at issue in the termination of parental rights proceeding at issue in this case, we will refrain from discussing the status of the twins' half-siblings in any detail in this opinion.

visits with the children; and acquire a valid driver's license and transportation. Similarly, the trial court ordered respondent-father to continue to comply with the terms of his own family services agreement; continue to attend the Families Understanding Nurturing Program; join in couple's therapy with respondent-mother; participate in family therapy with the twins when their therapist deemed it appropriate for him to do so; visit with the children; and acquire a valid driver's license and transportation. The parents were granted at least one hour of supervised visitation with the children each week.

¶ 4 On 5 October 2018, respondent-mother filed a motion in which she requested that a trial home placement be authorized. After conducting a permanency planning hearing on 21 November 2018, Judge Cayton entered an order finding that respondent-mother had completed the Families Understanding Nurturing Program, participated in couple's counseling, and taken advantage of all available opportunities to visit with the children. In addition, Judge Cayton found that respondent-mother had continued to participate in therapeutic treatment at Pamlico Counseling until July 2018 and that, on 14 November 2018, she had resumed participating in therapy with Dream Provider Care Services. On the other hand, Judge Cayton found that respondent-mother remained unemployed and did not wish to seek or obtain employment. Similarly, Judge Cayton found that respondent-father had completed the Families Understanding Nurturing Program, attended couple's counseling, and taken advantage of all available opportunities to visit with the children. Finally, Judge Cayton found that neither parent had obtained a valid driver's license. Based upon these and other findings, Judge Cayton determined that the parents had made sufficient progress to warrant a trial home placement and established a primary permanent plan of reunification, with a concurrent plan of adoption.

¶ 5 Following a permanency planning hearing held on 20 March 2019, the trial court entered an order on 21 March 2019 in which it found that the twins remained in a trial home placement with the parents and that, while "[t]he present risk of harm to the children in the [parents'] home is low," "the situation is rickety, perhaps prone to sudden collapse." On 2 May 2019, the trial home placement ended.

¶ 6 On 6 April 2020, DSS filed a motion alleging that the parents' parental rights in the twins were subject to termination on the basis of neglect, N.C.G.S. § 7B-1111(a)(1); willfully leaving the twins in a placement outside the home for more than twelve months without making reasonable progress toward correcting the conditions that had led to their removal from the family home, N.C.G.S. § 7B-1111(a)(2); willfully failing to pay

a reasonable portion of the cost of the care that the twins had received following their removal from the family home, N.C.G.S. § 7B-1111(a)(3); and dependency, N.C.G.S. § 7B-1111(a)(6), and that termination of the parents' parental rights would be in the twins' best interests. In its termination motion, DSS alleged that the trial home placement had ended in May 2019 after the parents had failed to deliver the twins to daycare in a timely manner, preventing the twins from receiving remedial services, such as speech and occupational therapy, and causing the twins' developmental progress to end or even regress. In addition, DSS alleged that the twins had been removed from the trial home placement because the parents had failed to provide them with proper supervision, with Jack having sustained burns after touching a "burn barrel" and with the parents having failed to report the injury to DSS or to seek medical treatment for this injury.

¶ 7 After hearings held on 30 September and 2 October 2020, the trial court entered an adjudication order on 22 October 2020 in which it concluded that all four of the grounds for termination alleged in the termination motion existed. After a hearing held on 3 May 2021, the trial court entered a dispositional order on 20 May 2021 determining that it was in the twins' best interests for the parents' parental rights to be terminated and ordering that their parental rights in the twins be terminated. *See* N.C.G.S. § 7B-1110(a) (2021). The parents noted appeals to this Court from the trial court's termination orders.

I. Standard of Review

¶ 8 "We review a trial court's adjudication under N.C.G.S. § 7B-1111 'to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law.' " *In re E.H.P.*, 372 N.C. 388, 392 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111 (1984)). Appellate review of the trial court's adjudicatory findings of fact is limited to "those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." *In re T.N.H.*, 372 N.C. 403, 407 (2019). "A trial court's finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding." *In re B.O.A.*, 372 N.C. 372, 379 (2019). "Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. at 407. "The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 373 N.C. 16, 19 (2019).

¶ 9 "If [the trial court] determines that one or more grounds listed in section 7B-1111 are present, the court proceeds to the dispositional stage, at which the court must consider whether it is in the best interests of the juvenile to terminate parental rights." *In re D.L.W.*, 368 N.C. 835, 842 (2016) (first citing *In re Young*, 346 N.C. 244, 247 (1997); and then citing N.C.G.S. § 7B-1110 (2015)). We review the trial court's dispositional findings to determine whether they are supported by sufficient evidence, *In re K.N.L.P.*, 380 N.C. 756, 2022-NCSC-39 ¶ 11, with unchallenged dispositional findings of fact being deemed binding for purposes of appellate review. *In re Z.L.W.*, 372 N.C. 432, 437 (2019). A trial court's dispositional determination "is reviewed solely for abuse of discretion," *In re A.U.D.*, 373 N.C. 3, 6 (2019) (citing *In re D.L.W.*, 368 N.C. at 842), with an abuse of discretion having occurred "where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re T.L.H.*, 368 N.C. 101, 107 (2015) (quoting *State v. Hennis*, 323 N.C. 279, 285 (1988)). We will now examine the validity of the parents' challenges to the trial court's termination orders utilizing the applicable standard of review.

II. Analysis

A. Adjudication

¶ 10 **[1]** As an initial matter, the parents argue that the trial court erred by determining that their parental rights in the twins were subject to termination. A single ground for termination is sufficient to support a trial court's decision to terminate a parent's parental rights in a child. *E.g.*, *In re Moore*, 306 N.C. 394, 404 (1982). We will begin our analysis by determining whether the trial court erred by concluding that the parents' parental rights in the twins were subject to termination based upon a failure to pay a reasonable portion of the cost of the care that the twins received after they were placed outside the family home pursuant to N.C.G.S. § 7B-1111(a)(3).

¶ 11 A trial court is authorized to terminate a parent's parental rights in a child pursuant to N.C.G.S. § 7B-1111(a)(3) in the event that

> [t]he juvenile has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent has for a continuous period of six months immediately preceding the filing of the petition or motion willfully failed to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

N.C.G.S. § 7B-1111(a)(3) (2021). As we have previously explained,

> [t]he cost of care refers to the amount it costs the Department of Social Services to care for the child, namely, foster care. A parent is required to pay that portion of the cost of foster care for the child that is fair, just and equitable based upon the parent's ability or means to pay.

In re J.M., 373 N.C. 352, 357 (2020) (cleaned up).

¶ 12 In support of its determination that the parents' parental rights in the twins were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(3), the trial court made the following findings of fact:

> 243. Mother and Father are [able-bodied] adults capable of working.
>
> 244. Throughout the pendency of this case, neither parent has contributed to the cost of these children's care. But, they have provided the juveniles with gifts.
>
> 245. Throughout the pendency of the case, Father has been consistently employed at Rose Acre Egg Farm; and, he testified that there is surplus money remaining after expenses are paid.
>
> 246. Father is able to adjust his income so that he can work more when necessary to make additional income. Father indicated that he is willing to do that to support these juveniles.
>
> 247. While Mother is physically able to work, she has chosen not to do so.

In addition, the trial court found that, on 23 April 2020, the Beaufort County Child Support Agency, acting on behalf of North Carolina Foster Care, had filed a complaint against the parents seeking an award of child support, that respondent-mother had been ordered to pay $50 per month in child support and found to owe an arrearage of $1,650 on 14 August 2020, and that respondent-father had been ordered to pay $473 per month in child support and found to owe an arrearage of $17,028 on 25 September 2020. The trial court further found that, even though the parents had the ability to pay child support in the required amounts, they "did not pay child support to offset the juveniles' cost of care" "during the period of time prior to the entry of those child support orders." In

addition, the trial court found that, while the parents had been aware as early as 2018 that a referral had been made to the Beaufort County Child Support Agency, neither of them had "attempted to look into the referral" or ascertain the amount of child support that they needed to pay. As a result, the trial court determined that the parents' failure to pay child support was "willful as both parents were aware they had the obligation to support their children, knew that [DSS] had made a referral to the Beaufort County Child Support Agency, and decided to take no step to address the issue until they were sued for failure to pay child support."

¶ 13 According to respondent-mother, the trial court erred in Finding of Fact No. 244 by determining that the parents had contributed nothing toward the cost of the care that the twins had received. In support of this contention, respondent-mother directs our attention to evidence tending to show that the parents had provided gifts, clothing, and diapers for the twins, arguing that these "in-kind contributions were [their] only option" because it was "impossible to pay the government money." We do not find this contention to be persuasive.

¶ 14 In *In re D.C.*, 378 N.C. 556, 2021-NCSC-104, the trial court made unchallenged findings that the parents were physically able to work, had started a lawn care business during the relevant six-month period, and had stated that their lawn care business earned sufficient income to permit them to support themselves and their children. *Id.* ¶ 15. Although the trial court found that the parents had provided to the child who was the subject of the termination proceeding "some food and gifts at visitation" and that they had given the juvenile "some small amount of spending money," *id.*, the trial court also found that the parents did not pay any child support or give DSS or the foster parents any money for use in defraying the cost of the care that the child had received. *Id.* In affirming the trial court's determination that the parents' parental rights in the child was subject to termination pursuant to N.C.G.S. § 7B-1111(a)(3), this Court stated that "[t]he trial court's unchallenged findings of fact demonstrate[d] that respondents had the ability to pay a reasonable portion of [the juvenile]'s cost of care *but failed to pay any amount to DSS or the foster parents toward cost of care.*" *Id.* ¶ 20 (emphasis added).

¶ 15 As was the case in *In re D.C.*, the record contains evidence tending to show that respondent-mother provided gifts, clothing, and diapers for the twins. However, as was also the case in *In re D.C.*, the sporadic provision of gifts for the benefit of the twins by respondent-mother does not preclude a determination that respondent-mother had failed to pay a reasonable portion of the cost of the care that the twins had received following their removal from the family home given that respondent-mother

made no payment to DSS or the foster parents during the pendency of the case, including the determinative six-month period, and given that the "cost of care" for purposes of N.C.G.S. § 7B-1111(a)(3) relates to the financial costs that DSS was required to assume while the twins were in its custody. *In re Montgomery*, 311 N.C. at 113. In view of the fact that the trial court's unchallenged findings of fact show that, even though respondent-mother had the physical ability to work, she elected not do so and the fact that the undisputed record evidence shows that respondent-mother failed to make any monetary payments to DSS or the foster parents for the purpose of assisting in the provision of care for the twins, we hold that respondent-mother's challenge to the sufficiency of the evidentiary support for Finding of Fact No. 244 lacks merit.

¶ 16 Secondly, respondent-mother argues that her failure to pay a reasonable portion of the cost of the care that the twins had received while in DSS custody was not willful because it is "impossible for a parent to pay the government child support" in the absence of a child support order and because DSS "did not formally ask [the parents] for child support until a month ***after*** it had already moved to terminate for nonpayment." We do not find this argument to be persuasive.

¶ 17 In *In re S.E.*, 373 N.C. 360 (2020), this Court recognized that "[t]he absence of a court order, notice, or knowledge of a requirement to pay support is not a defense to a parent's obligation to pay reasonable costs, because parents have an inherent duty to support their children." *Id.* at 366. In view of the fact that respondent-mother had an inherent duty to support the twins, she is not now entitled to argue that her failure to pay a reasonable portion of the cost of care that her children received while they were outside her home was not willful based upon the absence of an order requiring her to do so. In addition, the trial court's unchallenged findings of fact demonstrate that, even though respondent-mother had been aware as early as 2018 that a referral had been made to the child support enforcement agency relating to her support obligation, she had failed to investigate the referral or to attempt to ascertain the amount of child support that she needed to pay. As a result, the trial court's findings indicate that respondent-mother knew that she had failed to pay anything towards the cost of the care that her children had received despite DSS' contention that she needed to do so. *See id.* at 366–67 (finding that the respondent-mother "was on notice of her failure to pay something towards the cost of care for her children" in light of the fact that the trial court had repeatedly found in each of the permanency planning orders that had been entered in that case that neither of the parents was paying child support).

¶ 18 Finally, respondent-mother argues that allowing the termination of her parental rights in the twins pursuant to N.C.G.S. § 7B-1111(a)(3) in this case constitutes an "unconscionable and unconstitutional termination by ambush." More specifically, respondent-mother contends that terminating a parent's parental rights in a child for "failing to do the impossible (pay the government money) . . . without any formal notice of an obligation to do so" violates the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution. Respondent-mother notes that, while N.C.G.S. § 7B-1111(a)(4) precludes the termination of a parent's parental rights in a private termination action in the absence of formal notice that a payment obligation existed, "parents in child welfare cases may have their rights terminated under N.C.G.S. § 7B-1111(a)(3) *absent* such notice." For that reason, respondent-mother urges us to disavow our decision in *In re S.E.* in light of the constitutionally impermissible "disparate treatment" afforded to parents involved in private termination proceedings and parents involved in child welfare cases. However, since respondent-mother did not advance the constitutional argument upon which she now relies before the trial court, we decline to consider it for the first time on appeal. *See State v. Gainey*, 355 N.C. 73, 87 (2002) (reiterating that "[c]onstitutional issues not raised and passed upon at trial will not be considered for the first time on appeal").

¶ 19 In his sole challenge to the trial court's determination that his parental rights in the twins were subject to termination on the basis of a failure to pay a reasonable portion of the cost of the care that the twins had received after their removal from the family home pursuant to N.C.G.S. § 7B-1111(a)(3), respondent-father contends that the trial court had erred by failing to make specific findings concerning the six-month determinative period leading up to the filing of the termination motion, arguing in reliance upon *In re Faircloth*, 161 N.C. App. 523, 526 (2003), that a trial court's failure to make findings specifically addressing the relevant six-month period constitutes prejudicial error. In *In re Faircloth*, the record reflected that, despite finding that the respondent-mother had been employed "at various times since 1999," the trial court's findings did not specifically address whether she had been employed from 3 February 2000 to 3 August 2000, which constituted the determinative six-month period for purposes of that case, "or whether she was otherwise financially able to pay." *Id.* at 526. In overturning the trial court's termination order, the Court of Appeals concluded that, "[a]bsent such findings or evidence in the record that respondent-mother could pay some amount greater than zero towards the cost of care for children *during that period of time*," the record did not suffice to support

the termination of the respondent-mother's parental rights pursuant to N.C.G.S. § 7B-1111(a)(3). *Id.* (emphasis added).

¶ 20 In this case, however, the trial court's unchallenged findings of fact indicate that, "[t]hroughout the pendency of the case, [respondent-father] has been consistently employed at Rose Acre Egg Farm." In other words, unlike the situation at issue in *In re Faircloth*, the undisputed record evidence in this case reflects that respondent-father was continuously employed from the beginning of the case until the time of the termination hearing, an interval that necessarily included the determinative six-month period. In addition, the trial court's unchallenged findings of fact establish that, even though respondent-father had the ability to make payments to offset a portion of the cost of the care that the children had received after their removal from the family home, he had failed to pay any amount towards their care. As a result, the trial court's findings of fact provide ample support for its conclusion that respondent-father's parental rights in the twins were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(3). In light of our decision that the trial court did not err by concluding that both parents' parental rights in the twins were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(3), we need not address their challenges to the trial court's determination that their parental rights in the twins were also subject to termination for neglect, N.C.G.S. § 7B-1111(a)(1); failure to make reasonable progress toward correcting the conditions that had led to the twins' removal from the family home, N.C.G.S. § 7B-1111(a)(2); and dependency, N.C.G.S. § 7B-1111(a)(6). *E.g.*, *In re E.H.P.*, 372 N.C. at 395.

B. Disposition

¶ 21 **[2]** The parents both argue that the trial court abused its discretion by concluding that the twins' best interests would be served by the termination of their parental rights in light of the fact that the twins had a strong bond with the parents, that the parents had not missed any opportunity to visit with the children during the forty-two month history of this case, and that "the current plan of shared parenting and visitation was "working for everyone." As part of this process, the parents challenge some of the trial court's dispositional findings of fact as lacking sufficient evidentiary support[3] and assert that the trial court should have utilized a "least restrictive disposition" standard in making its dispositional decision.

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3. Among the dispositional findings that the parents challenge as lacking in sufficient evidentiary support is Finding of Fact No. 82, which states that "[i]t is in the [twins'] best interests to remain placed in the home of [their foster parents], as the [twins] have bonded to them." Although the trial court labeled this determination as a finding of fact, it is, in

¶ 22 In determining whether the termination of a parents' parental rights is in a child's best interests,

> [t]he court may consider any evidence, including hearsay evidence as defined in N.C.G.S. [§] 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the best interests of the juvenile. In each case, the court shall consider the following criteria and make written findings regarding the following that are relevant:
>
> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

N.C.G.S. § 7B-1110(a) (2021).

¶ 23 As an initial matter, the parents challenge the sufficiency of the evidentiary support for dispositional Finding of Fact No. 40 which states that, in "the [foster parents' home], the [twins] have a routine, with established services," and that "[t]o move the [twins] now would result in a complete disruption of their lives, which would be needlessly detrimental." A DSS supervisor testified at the termination hearing that, even though Jack had experienced developmental delays, he had made "a lot of progress" while in the foster parents' care and that the twins' "well[-]being, their education, down to fun things," had changed dramatically during that time. According to the DSS supervisor, the foster parents took the twins on trips, taught them to swim and ride a bicycle, potty-trained them, and addressed their medical needs by having one of the twin's tongue-tie clipped and by having tubes placed in both twins'

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reality, a conclusion of law and will be treated as such in our analysis. *See In re J.S.*, 374 N.C. 811, 818 (2020) (stating that "[w]e are obliged to apply the appropriate standard of review to a finding of fact or conclusion of law, regardless of the label which it is given by the trial court.").

ears. On the other hand, the DSS supervisor testified that, prior to the time that DSS had become involved in their lives, the twins did not receive any services even though Jack "require[d] a lot of time and a lot of appointments[] and consistency" in light of the fact that being "out of routine . . . really throws him off." Among other things, the DSS supervisor testified that Jack needed play therapy, medication appointments, occupational therapy, and speech therapy and that, while living with the foster parents, Jack did not miss any of his appointments and had received his medication on a daily basis. In the DSS supervisor's opinion, the foster parents had put "a lot of effort in teaching these kids and loving these kids and nurturing these kids" and that the removal of the twins from the foster parents' home "would uproot all of their services that they have been getting for years" and be "absolutely detrimental" to the progress that the twins had made while in the foster parents' care. Based upon this testimony, we hold that dispositional Finding of Fact No. 40 has ample evidentiary support.

¶ 24 In addition, the parents challenge the sufficiency of the evidentiary support for dispositional Finding of Fact No. 47, which states that their "ease of leaving the [parents] indicates that the [twins] do not have a strong bond with the" parents and that the twins "have been out of their home for so long that the [twins] view the [foster parents] as their caretakers." Arguing in reliance upon respondent-mother's testimony that she has an "[a]mazing" bond with the twins, the maternal great-grandfather's testimony that he had "never seen [the bond between respondents and the twins] be weak," and the maternal great-grandmother's testimony that respondents "love [the twins]. They just love them. They're their lives," the parents assert that "[a]ll the evidence pointed to a strong bond." In addition, the parents note that they never missed an opportunity to visit with the twins, "except for one" instance involving respondent-mother, over a period of forty-two months.

¶ 25 According to well-established North Carolina law, a trial court's findings of fact are binding for purposes of appellate review "where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary." *In re Montgomery*, 311 N.C. at 110–11. Although the evidence upon which the parents' rely in challenging to the sufficiency of the record to support dispositional Finding of Fact No. 47 relies certainly appears in the record, a DSS supervisor described the twins' bond with respondents as "attenuated." After acknowledging the parents' consistency in visiting with the twins, the DSS supervisor testified that the twins are not "put off" or crying at the beginning or end of their visits with the parents and that the twins

were "fine" about returning to their foster mother at the conclusion of these visits. In addition, the DSS supervisor testified that, since the foster parents had "been [the twins'] caretakers for so long" and since the foster parents' other children referred to them as "mommy" and "daddy," the twins had been "picking up on mommy, daddy roles." In light of this evidence, we hold that the trial court reasonably inferred that the twins lacked a strong bond with the parents and that they viewed their foster parents as their caretakers, *see In re D.L.W.*, 368 N.C. at 843 (stating that it is the trial judge's duty to consider all the evidence, to pass upon the credibility of the witnesses, and to determine the reasonable inferences to be drawn from the evidence). As a result, dispositional Finding of Fact No. 47 has sufficient record support.

¶ 26 Thirdly, the parents argue that the trial court abused its discretion by terminating their parental rights without utilizing a "least restrictive disposition" test in order to make this determination. As part of this process, the parents assert that the trial court should have ascertained whether "continued contact with the birth family" would have benefitted the twins and that, since the parents and the foster parents "worked together and shared parenting," the trial court should not have "[e]nd[ed] all contact" between the twins and the parents. The parents urge us to "follow the lead of a number of other jurisdictions" by adopting a dispositional standard "that encourages contact between parents and children even when the parents cannot regain custody," citing *Fla. Dep't of Child. & Fams. v. F.L.*, 880 So. 2d 602, 609–10 (2004) (per curiam) (holding that a parent's rights may be terminated pursuant to a specific statutory provision "only if the state proves both a prior involuntary termination of rights to a sibling and a substantial risk of significant harm to the current child" and that "the state must prove that the termination of parental rights is the least restrictive means of protecting the child from harm"); Iowa Code § 232.99(4) (2020) (providing that, "[w]hen the dispositional hearing is concluded the court shall make the least restrictive disposition appropriate considering all the circumstances of the case"); Ark. Code Ann. § 9-27-329(d) (West 2021) (providing that, "[i]n initially considering the disposition alternatives and at any subsequent hearing, the court shall give preference to the least restrictive disposition consistent with the best interests and welfare of the juvenile and the public"); Utah Code Ann. § 80-4-104(6) (West 2021) (providing that, "[b]efore an adjudication of unfitness, government action in relation to a parent and a parent's child may not exceed the least restrictive means or alternatives available to accomplish a compelling state interest"); S.D. Codified Laws § 26-8A-27 (2021) (providing that, "[o]n completion of a final dispositional hearing regarding a child adjudicated to be abused or

neglected, the court may enter a final decree of disposition terminating all parental rights of one or both parents of the child if the court finds, by clear and convincing evidence, that the least restrictive alternative available commensurate with the best interests of the child with due regard for the rights of the parents, the public and the state so requires"); N.H. Rev. Stat. Ann. § 169-D:17 (2021) (providing that, "[i]f the court finds the child is in need of services, it shall order the least restrictive and most appropriate disposition considering the facts in the case, the investigation report, and the dispositional recommendations of the parties and counsel"); and Wyo. Stat. Ann. § 14-3-431(j)(iii)(A) (West 2021) (providing that, "[a]t the permanency hearing, the department of family services shall present to the court[, i]f the child is placed in a qualified residential program[,] [i]nformation to show that ongoing assessment of the child's strengths and needs continues to support the determination that placement in a qualified residential treatment program provides the most effective and appropriate level of care for the child in the least restrictive environment consistent with the short-term and long-term goals of the child and the child's permanency plan").

¶ 27 As an initial matter, we note that the Iowa, Arkansas, and New Hampshire statutes upon which the parents rely relate to the dispositional determination that must be made in the aftermath of an adjudication that a child is abused, neglected, dependent, or in need of services. *See* Iowa Code § 232.2(6); Ark. Code Ann. § 9-27-303(16), (37); N.H. Rev. Stat. Ann. § 169-D:2(II). In addition, the Wyoming statute upon which the parents rely addresses the status of juveniles placed in "qualified residential treatment program[s]." Wyo. Stat. Ann. § 14-3-431(j)(iii)(A). As a result, none of these statutory provisions have any direct bearing upon the proper resolution of the issue that is before us in this case.

¶ 28 In addition, this Court has previously observed that

> [t]he purpose of termination of parental rights proceedings is to address circumstances where parental care fails to "promote the healthy and orderly physical and emotional well-being of the juvenile," while also recognizing "the necessity for any juvenile to have a permanent plan of care at the earliest possible age." N.C.G.S. § 7B-1100. In North Carolina, the best interests of the child are the paramount consideration in termination of parental rights cases. *See In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984). Thus, when there is a conflict between the interests of the child and the parents, courts should

> consider actions that are within the child's best interests over those of the parents. N.C.G.S. § 7B-1100(3).

In re F.S.T.Y., 374 N.C. 532, 540 (2020). In light of these considerations, we have

> rejected arguments that the trial court commits error at the dispositional stage of a termination of parental rights proceeding by failing to explicitly consider non-termination-related dispositional alternatives, such as awarding custody of or guardianship over the child to the foster family, by reiterating that "the paramount consideration must always be the best interests of the child."

In re N.K., 375 N.C. 805, 820 (2020) (quoting *In re J.J.B.*, 374 N.C. 787, 795 (2020)). As a result, we hold that there is no basis for the use of a "least restrictive disposition" test in this Court's termination of parental rights jurisprudence.

¶ 29 A careful examination of the record reflects that the trial court considered the factors enunciated in N.C.G.S. § 7B-1110(a) in making its dispositional decision. The trial court found that the twins were five years old at that time; that there was a high likelihood that they would be adopted by their foster parents, who had "expressed a willingness to adopt" the twins; and that, since the twins' concurrent permanent plan was adoption, termination of the parents' parental rights would "work to further the achievement of that plan." The trial court further found that, given the twins' "ease of leaving" the parents at the conclusion of parental visits, the twins did not have a strong bond with the parents and that the twins had been out of the parents' home for such a long period of time that they viewed the foster parents as their caretakers. On the other hand, the trial court found that the twins' relationship with their foster parents was "of a high quality, evidencing a strong bond," and that Jaden was "very close" to his foster father, with "the two of them [having constructed] things together, such as a Lego table that was built for the boys." Finally, the trial court found that the foster parents had ensured that the twins' needs were met and that the twins had been in DSS custody since 23 October 2017, amounting to a period of approximately forty-two months, at the time of the termination hearing. Based upon these and other findings of fact, the trial court concluded that "it is in the juveniles' best interest for the parental rights of [the parents] to be terminated. In view of the fact that the trial court's dispositional orders reflect proper consideration of the required statutory criteria, we are unable to conclude that the trial court's determination that termination

of the parents' parental rights would be in the twins' best interests was manifestly unsupported by reason. As a result, the trial court did not err in concluding that the parents' parental rights in the twins were subject to termination based upon the parents' failure to pay a reasonable portion of the cost of the care that the twins had received following their removal from the family home pursuant to N.C.G.S. § 7B-1111(a)(3) and that the termination of the parents' parental rights would be in the twins' best interests. Thus, we affirm the trial court's termination orders.

AFFIRMED.

IN THE MATTER OF J.D.O., J.D.O., & J.D.O.

No. 303A21

Filed 15 July 2022

1. Termination of Parental Rights—subject matter jurisdiction —findings—record support

The trial court had subject matter over a termination of parental rights action where the trial court's order included a determination that it had subject matter jurisdiction and the record supported that determination. The trial court was not required to make an express finding of jurisdiction under N.C.G.S. §§ 50A-201, 50A-203, or 50A-204.

2. Termination of Parental Rights—grounds for termination—neglect—likelihood of future neglect—ongoing substance abuse

The trial court's order terminating respondent-mother's parental rights in her children on the grounds of neglect was affirmed where, despite some non-fatal deficiencies in the order, the children had been adjudicated as neglected and the mother continued to have substance abuse issues that demonstrated a likelihood of future neglect—as shown by her refusal to regularly comply with her case plan's required random drug screens and by the positive test for cocaine in her newborn daughter.

3. Termination of Parental Rights—appellate review—cumulative error review—declined to extend

The Supreme Court declined to expand the doctrine of cumulative error review to a termination of parental rights matter.

IN RE J.D.O.

[381 N.C. 799, 2022-NCSC-87]

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) (2019) from an order entered on 27 May 2021 by Judge Gregory A. Bullard in District Court, Robeson County. This matter was calendared for argument in the Supreme Court on 1 July 2022 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

J. Edward Yeager Jr. for petitioner-appellee Robeson County Department of Social Services.

Laura K. Greene for appellee Guardian ad Litem.

Benjamin J. Kull for respondent-appellant mother.

MORGAN, Justice.

¶ 1 Respondent-mother appeals from the trial court's order which terminated her parental rights to the minor children Johnny, Janelle, and Joel.[1] The order also terminated the parental rights of the alleged putative father of the children and the parental rights of any unknown father. There is no father who is a party to this appeal.

¶ 2 On appeal, respondent-mother challenges the trial court's determination of the existence of grounds to terminate her parental rights to the juveniles under N.C.G.S. § 7B-1111(a)(1)–(3). She argues that the adjudication is unsupported by the evidence received by the trial court at the termination of parental rights hearing and that the trial court's findings of fact are insufficient to support the establishment of grounds to terminate her parental rights to the three juveniles. Based on our conclusion that the trial court's adjudication of neglect under N.C.G.S. § 7B-1111(a)(1) is supported by clear, cogent, and convincing evidence, which in turn supports the findings of fact included in the termination of parental rights order addressing the ground of neglect, we affirm the trial court's termination of respondent-mother's parental rights.

I. Factual and Procedural Background

¶ 3 On the evening of 7 December 2018, Robeson County Department of Social Services (DSS) obtained nonsecure custody of respondent-mother's six children, including Johnny, Janelle, and Joel, after receiving multiple

1. Pseudonyms have been utilized in lieu of the actual names of the children in order to protect their identities and for ease of reading.

reports of respondent-mother's extensive drug use. DSS filed juvenile petitions on 10 December 2018 alleging that Johnny, Janelle, and Joel were neglected juveniles because they did not receive proper care, supervision, or discipline from their parents and lived in an environment which was injurious to their welfare. The petitions recounted the circumstances of respondent-mother's illegal drug use which were referenced in reports received by DSS on 25 October 2018 and 7 December 2018, including information that respondent-mother tested positive for cocaine when she was admitted to the hospital to give birth to her infant son Liam, who also tested positive for Suboxone[2] and cocaine; that respondent-mother "had not had any prenatal care during her pregnancy with [Liam] but had been to the emergency room while pregnant on different occasions and tested positive for cocaine, benzos, and oxycodone"; that respondent-mother overdosed on Suboxone and Neurontin on 7 December 2018 and was found unconscious in her car at a gas station while Liam and another child were in the vehicle with her; that respondent-mother "was not alert" when she was admitted to the hospital for the 7 December 2018 overdose; and that Emergency Medical Services (EMS) was previously called to the home of the mother of respondent-mother in September 2016 after respondent-mother had overdosed on controlled substances. The petitions further alleged that DSS had been involved with the family since February 2012 due to multiple neglect referrals spawned by respondent-mother's substance abuse.

¶ 4 DSS's petitions were presented at a hearing on 4 April 2019, after which the trial court entered an order on 16 July 2019 adjudicating the six children to be neglected juveniles. The trial court made several findings of fact in its order which addressed the accounts that had been reported to the assigned DSS social worker, Miranda Wilkins, by various sources. The trial court determined that respondent-mother "neither admits nor denies the allegations . . . but does not oppose a finding of neglect." The trial court's dispositional order maintained the children in DSS custody and directed the agency to continue its efforts toward reunification of respondent-mother with the children. Further, the trial court determined that respondent-mother needed to complete substance abuse and mental health assessments and to follow the recommendations resulting from those evaluations. The tribunal likewise decided that respondent-mother must obtain housing and employment.

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2. Suboxone is a brand name for sublingual buprenorphine, a drug used to treat opioid use disorders by preventing withdrawal symptoms caused by cessation of opioid use. *Buprenorphine*, Substance Abuse and Mental Health Servs. Admin., https://www.samhsa.gov/medication-assisted-treatment/medications-counseling-related-conditions/buprenorphine (last updated Apr. 21, 2022).

¶ 5 In its initial permanency planning order entered in this case on 29 October 2019, the trial court established a primary permanent plan of reunification with a concurrent plan of adoption. The trial court found that respondent-mother was attending substance abuse treatment at RAPHA Healthcare Services but "ha[d] not made any progress on" other components of her case plan. In a subsequent permanency planning order entered on 7 April 2020, the trial court maintained the primary plan for Johnny, Janelle, and Joel as adoption with a concurrent plan of reunification, but encouraged DSS to "primarily focus" on the plan of adoption. The trial court found that "[n]one of the parents have made substantial progress at eliminating the issues that brought the children into care" and that respondent-mother "was receiving substance abuse treatment at RAPHA, but she no longer attends RAPHA. The mother is pregnant and has entered Our House."

¶ 6 DSS filed a petition to terminate respondent-mother's parental rights to Johnny, Janelle, and Joel on 28 April 2020, alleging that grounds existed to terminate respondent-mother's parental rights because (1) she had failed to make reasonable progress to correct the conditions which had precipitated the removal of the juveniles from her care within the meaning of N.C.G.S. § 7B-1111(a)(2); (2) she had neglected the juveniles within the meaning of N.C.G.S. § 7B-101(15); and (3) she had willfully failed, for a continuous period of six months immediately preceding the filing of the petition, to pay a reasonable portion of the cost of care for the juveniles although physically and financially able to do so within the meaning of N.C.G.S. § 7B-1111(a)(3). Following hearings conducted on 29 April 2021 and 17 May 2021, the trial court entered an order terminating respondent-mother's parental rights to the three children on 27 May 2021. As its statutory grounds for termination, the trial court concluded that respondent-mother had previously neglected the children as evidenced by the trial court's 2019 adjudication and that there existed the likelihood of future, repeated neglect if the children were returned to her care, *see* N.C.G.S. § 7B-1111(a)(1) (2021); that respondent-mother had willfully left the children in a placement outside the home for more than twelve months without making reasonable progress to correct the conditions leading to the removal of the children from respondent-mother's care, *see* N.C.G.S. § 7B-1111(a)(2); and that respondent-mother willfully failed to pay a reasonable portion of the children's cost of care, although physically and financially able to do so, for the six months immediately preceding the filing of the petition to terminate her parental rights on 28 April 2020[3], *see* N.C.G.S. § 7B-1111(a)(3). The trial court

3. We note that the petition to terminate respondent-mother's parental rights in this matter filed on 28 April 2020 asserted only that "the alleged father" had failed to pay the

further concluded that it was in the best interests of Johnny, Janelle, and Joel that respondent-mother's parental rights be terminated. *See* N.C.G.S. § 7B-1110(a) (2021).

¶ 7 Respondent-mother filed timely notice of appeal from the termination of parental rights order. *See* N.C.G.S. § 7B-1001(a1)(1) (2019).

II. Analysis

A. Subject matter jurisdiction

¶ 8 **[1]** Respondent-mother first claims that the trial court's order terminating her parental rights is void for lack of subject matter jurisdiction because the trial court failed to make written findings of fact to establish the basis for its jurisdiction under N.C.G.S. § 7B-1101. While respondent-mother acknowledges that this Court rejected an identical challenge to the trial court's jurisdiction in *In re K.N.*, 378 N.C. 450, 2021-NCSC-98, she "respectfully submits that [*In re*] *K.N.* was wrongly decided on this issue."

¶ 9 Section 7B-1101 provides as follows:

> The [trial] court shall have exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition or motion. . . . Provided, that before exercising jurisdiction under this Article, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201, 50A-203, or 50A-204.

N.C.G.S. § 7B-1101 (2021); *see also* N.C.G.S. § 7B-101(6) (2021) (defining "[c]ourt" as "[t]he district court division of the General Court of Justice").

¶ 10 Because the trial court made no express finding that it had jurisdiction to make a child custody determination under N.C.G.S. §§ 50A-201, 50A-203, or 50A-204, respondent-mother contends that "it could not

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reasonable cost of care for the children as a subsection within a larger allegation setting forth the proposed grounds for terminating the parental rights of respondent-mother. Ultimately, this discrepancy between the allegation in the petition and the trial court's finding of the existence of the ground under N.C.G.S. § 7B-1111(a)(3) is immaterial to the disposition of this case.

properly exercise jurisdiction to conduct the termination proceeding or enter the resulting order." In *In re K.N.*, this Court considered the fact-finding requirements of N.C.G.S. § 7B-1101 and held that "[t]he trial court is not required to make specific findings of fact demonstrating its jurisdiction under the UCCJEA,[4] but the record must reflect that the jurisdictional prerequisites of the Act were satisfied when the court exercised jurisdiction." *In re K.N.*, ¶ 21 (first alteration in original) (quoting *In re L.T.*, 374 N.C. 567, 569 (2020)). We reaffirmed this principle in *In re M.S.L.*, 380 N.C. 778, 2022-NCSC-41, concluding as follows:

> Here the trial court stated that it "has jurisdiction over the parties and the subject matter of this action." The record here supports the trial court's finding and a conclusion that the trial court had both subject matter and personal jurisdiction in this case. Given that Monica resided in North Carolina since her birth, North Carolina is her "home state." . . . Thus, because the trial court's finding and the record support a conclusion that the trial court had subject matter jurisdiction here, respondent's argument is overruled.

Id. ¶ 16 (citing *In re K.N.*, ¶¶ 18–22).

¶ 11 The record before us shows that Johnny, Janelle, and Joel were born in North Carolina and resided in North Carolina for more than six consecutive months immediately preceding DSS's initiation of both the original juvenile proceedings in December 2018 and the termination of parental rights proceedings in April 2020. North Carolina therefore was established statutorily to be the juveniles' "home state" as defined by N.C.G.S. § 50A-102(7), which governs a trial court's authority to exercise jurisdiction to make an initial child custody determination under N.C.G.S. § 50A-201(a)(1). *See* N.C.G.S. § 50A-102(7) (2021).

¶ 12 Similar to the trial court's establishment of jurisdiction which was approved by this Court in *In re M.S.L.*, the trial court's order in the present case included a determination "[t]hat the [c]ourt has jurisdiction over the parties and subject matter herein pursuant to Article 11 of Chapter 7B of the North Carolina General Statutes." Since N.C.G.S. § 7B-1101 does not require any additional findings to support the trial court's exercise of jurisdiction, respondent-mother's argument is overruled. *See In re M.S.L.*, ¶ 16.

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4. Sections 50A-201, -203, and -204 of our General Statutes are part of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). *See* N.C.G.S. §§ 50A-201, -203, -204 (2021).

B. Adjudication under N.C.G.S. § 7B-1111(a)

¶ 13 **[2]** Respondent-mother next claims that the trial court erred in its determination of the existence of grounds for termination of her parental rights pursuant to N.C.G.S. § 7B-1111(a)(1)–(3) in its termination order. In addressing her arguments, we employ the following standard of review:

> We review the trial court's adjudication under N.C.G.S. § 7B-1111(a) to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law. Unchallenged findings of fact are deemed supported by competent evidence and are binding on appeal. Moreover, we review only those findings needed to sustain the trial court's adjudication.
>
> The issue of whether a trial court's findings of fact support its conclusions of law is reviewed de novo. However, an adjudication of any single ground for terminating a parent's rights under N.C.G.S. § 7B-1111(a) will suffice to support a termination order. Therefore, if this Court upholds the trial court's order in which it concludes that a particular ground for termination exists, then we need not review any remaining grounds.

In re J.I.G., 380 N.C. 747, 2022-NCSC-38, ¶ 8 (extraneity omitted) (quoting *In re B.J.H.*, 378 N.C. 524, 2021-NCSC-103, ¶ 11).

¶ 14 Before presenting her stance on the substantive content of various findings of fact reached by the trial court, respondent-mother characterizes the trial court's adjudicatory findings as "riddled with inexplicable errors" impacted by the trial court's evidentiary rulings. Respondent-mother submits that the trial court made a series of findings purporting to rely upon documents contained in the juvenile case file and designated as Exhibits L through S, which "were never offered or accepted into evidence during [the termination] hearing." (Emphasis omitted.) Respondent-mother also challenges the trial court's finding that it "took judicial notice of the entire underlying court file[,]" which contradicts the trial court's oral ruling at the hearing that it would only take judicial notice of the 2019 adjudication order. Respondent-mother also claims that the trial court made "irreconcilably confusing" rulings about the admissibility of Exhibits K and K1, which are two case timelines prepared by DSS social workers that respondent-mother argues contained inadmissible hearsay.

¶ 15 DSS concedes that "there are numerous elements within the termination order which simply cannot be explained given the transcript and the current record." DSS opines that these discrepancies may be attributed to the video-conferencing technology that was used to conduct the termination of parental rights hearing remotely, suggesting that the assorted instances where the proceedings are transcribed as "inaudible"[5] indicate the additional "possib[ility] that some portions [of the hearing] were not captured through the recording." Notwithstanding any inconsistencies or errors in the trial court's evidentiary rulings, DSS asserts that "there is sufficient competent evidence to support this Court affirming the termination order."

¶ 16 Our appellate courts have consistently held that a trial court may take judicial notice of the underlying juvenile case file at a hearing on a termination of parental rights petition. *E.g.*, *In re T.N.H.*, 372 N.C. 403, 408 (2019) ("[T]he trial court in this case relied partly on evidence from prior proceedings and findings in earlier orders, which . . . is proper and appropriate."); *In re M.N.C.*, 176 N.C. App. 114, 120 (2006) ("This [c]ourt has held '[a] trial court may take judicial notice of earlier proceedings in the same cause' and that it is not necessary for either party to offer the file into evidence." (alteration in original) (quoting *In re Isenhour*, 101 N.C. App. 550, 553 (1991))); *see also In re J.K.F.*, 379 N.C. 247, 2021-NCSC-137, ¶ 22 & n.2 (upholding adjudicatory finding based on a document admitted at a prior review hearing, while noting that "[t]he trial court took 'judicial notice of all orders, court reports, attachments to court reports, and other documents contained in the underlying juvenile files' "). We have qualified this standard with the principle that "the trial court may not rely solely on prior court orders and reports but must receive some oral testimony at the hearing and make an independent determination regarding the evidence presented." *In re T.N.H.*, 372 N.C. at 410. Furthermore, "[g]enerally, where a trial court's ruling rendered in open court is inconsistent with its written order, the written order controls." *In re M.R.F.*, 378 N.C. 638, 2021-NCSC-111, ¶ 4 n.2 (citing *In re A.U.D.*, 373 N.C. 3, 9–10 (2019)).

¶ 17 The termination hearing transcript shows that DSS asked the trial court "to take judicial notice of the prior JA file, the prior adjudication order that is in the JA file, . . . along with the findings in that file." Both respondent-parents objected to the trial court's exercise of judicial notice to be utilized in this manner. After a bench conference, the trial court directed DSS's counsel to "restate [DSS's] request of the [c]ourt

5. A search of the 340-page hearing transcript yields 692 instances of the term "inaudible."

in terms of what . . . you're asking the [c]ourt to take judicial notice of." DSS, through its counsel, then asked the trial court to take judicial notice of the tribunal's 2019 adjudication of neglect and the findings included in the adjudication order. In overruling the parents' objections at the termination of parental rights hearing, the trial court announced its intention to "take judicial notice of the order of adjudication in these matters and the facts and findings made therein." Later in the hearing, however, the trial court announced that it had taken judicial notice of the entire juvenile case file.[6] The termination of parental rights order includes a finding that the trial court took "judicial notice of the underlying Juvenile File."[7]

¶ 18 The termination of parental rights order also includes eight findings in which the trial court "relies on and accepts into evidence" DSS Exhibits L through S, which are the following documents:

> Exhibit L: Respondent-mother's comprehensive clinical assessment from Southeastern Integrated Care, dated 6 October 2020;
>
> Exhibit M: The father's comprehensive clinical assessment from Southeastern Integrated Care, dated 6 October 2020;
>
> Exhibit N: Results from the father's drug screens and certificates of completion for substance abuse classes and parenting classes from Southeastern Integrated Care;
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> Exhibit O: Respondent-mother's drug screens and certificates of completion for substance abuse classes and parenting classes from Southeastern Integrated Care;

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6. As respondent-mother observes, in rendering its ruling at the conclusion of the adjudicatory stage of the termination hearing, the trial court stated that it had "take[n] judicial notice of the adjudication from April 3rd, 2019." Although this statement does not preclude the trial court from also taking judicial notice of the complete case file, the statement demonstrates the inconsistency in the trial court's oral pronouncements.

7. Respondent-mother also challenges the trial court's decision to take "judicial notice of . . . [DSS's] efforts to work with" her. She argues that "[s]uch 'facts' are obviously well-beyond the scope of the relevant Rule of Evidence" because they are subject to reasonable dispute. *See* N.C.G.S. § 8C-1, Rule 201(b) (2021). Because we deem respondent-mother's position to harbor some degree of merit and because this challenged finding is not "needed to sustain the trial court's adjudication[,]" *In re J.I.G.*, 380 N.C. 747, 2022-NCSC-38, ¶ 8, we shall disregard it for purposes of our review.

> Exhibit P: Respondent-mother's drug screens from RAPHA Healthcare Services;
>
> Exhibit Q: Letter from Brittany Locklear, MSW LCAS-A, a substance abuse therapist at Southeastern Integrated Care, vouching for the parents' "progress on their parenting skills and mental health goals";
>
> Exhibit R: Respondent-mother's Family Services Agreement with DSS; and
>
> Exhibit S: DSS placement logs for Johnny, Janelle, and Joel.

Although none of these documents were admitted into evidence, or even tendered for admission into evidence during the termination of parental rights hearing,[8] respondent-mother acknowledges that they were part of the juvenile case file. Additionally, as we later explain, respondent-mother does not identify any substantive finding by the trial court in the termination of parental rights order that is based exclusively on the contents of Exhibits L through S to the exclusion of witness testimony presented at the hearing. Furthermore, respondent-mother fails to identify any evidentiary conflict which these exhibits were utilized to resolve by the trial court. In sum, respondent-mother fails to establish that she was prejudiced by the trial court's consideration of these documents which were indisputably included in the juvenile case file.

¶ 19 We conclude that the trial court's oral rulings regarding the original parameters of its employment of judicial notice were superseded by its written findings which effectively took judicial notice of all documents in the juvenile case file, including Exhibits L through S. *See In re M.R.F.*, ¶ 4 n.2. Accordingly, to the extent that respondent-mother objects to the trial court's act of "accept[ing] into evidence" Exhibits L through S, respondent-mother's arguments are unpersuasive.

¶ 20 Respondent-mother's contentions regarding the trial court's "irreconcilably confusing" rulings on Exhibits K and K1—the case timelines documented by DSS social workers—are likewise unconvincing.[9] Although

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8. It appears that DSS offered Exhibit L into evidence at a permanency planning hearing which was conducted immediately after the conclusion of the termination of parental rights hearing.

9. Exhibit K, titled "Termination of Parental Rights Adjudication Hearing," recounts DSS's involvement with the parents and their children, as well as the parents' participation in services and the course of the juvenile court proceedings between February 2012 and October 2020. Exhibit K1, titled "Termination of Parental Rights Disposition Hearing,"

the trial court made oral rulings purporting to receive these exhibits into evidence, respondent-mother asserts that the trial court's written findings indicate a contrasting outcome, which is "that the court did not actually accept [these exhibits] into evidence at all."

¶ 21 Given that the trial court's written rulings control, and that the trial court's written findings which determined the inadmissibility of Exhibits K and K1 comport with respondent-mother's position on the inadmissibility of these exhibits, respondent-mother does not show error based upon the trial court's oral rulings. *In re S.D.C.*, 381 N.C. 152, 2022-NCSC-55, ¶ 13. Respondent-mother fails to show that the trial court relied upon the DSS timelines contained in Exhibits K and K1 rather than witness testimony in making any substantive findings of fact.[10] *Cf. In re I.E.M.*, 379 N.C. 221, 2021-NCSC-133, ¶ 16 ("Respondent-mother has failed to identify any inadmissible hearsay evidence upon which the trial court erroneously relied in the course of making the findings of fact contained in its termination order and has failed, for that reason, to establish that the trial court erred by considering the timeline in deciding that respondent-mother's parental rights in [the juvenile] were subject to termination.").

¶ 22 Respondent-mother further contends that the trial court's substantive findings of fact are insufficient to support any of the grounds which the tribunal determined to exist in order to terminate respondent-mother's parental rights under N.C.G.S. § 7B-1111(a). She characterizes the trial court's findings as "scant" and "unsupported" by the evidence.

¶ 23 We recognize that some of the findings of fact rendered in the trial court's order are not artfully worded in some instances and are not ideally sturdy in other instances. Several of the trial court's findings, for example, merely "recite[ ] the testimony of various witnesses rather than indicating what actually happened" and therefore are not constructed as findings of fact in the customary manner. *In re A.C.*, 378 N.C. 377, 2021-NCSC-91, ¶ 12. In assessing the properness and sufficiency of the trial court's order as a whole, however, we determine that the totality of the trial court's adjudicatory findings is enough to establish the

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provides a similar chronology of DSS interactions with the parents and the parents' progress in the case from May 2020 to April 2021.

10. We note that the trial court orally admitted Exhibit K1 only "for illustrative purposes . . . to illustrate [the social worker's] testimony" and not as substantive evidence. *See generally State v. Gibbons*, 303 N.C. 484, 486 (1981) (distinguishing between illustrative and substantive evidence). In light of the trial court's written ruling, we decline to consider respondent-mother's suggestion that a text-based chronology of events cannot constitute illustrative evidence.

existence of grounds for the termination of respondent-mother's parental rights under N.C.G.S. § 7B-1111(a)(1) based upon her neglect of the children.

¶ 24 Under N.C.G.S. § 7B-1111(a)(1), the trial court may terminate parental rights if "[t]he parent has . . . neglected the juvenile." A juvenile is deemed to be neglected if the juvenile does not receive proper care, supervision, or discipline from his or her parent or if the parent creates or allows to be created an environment injurious to the juvenile's welfare. N.C.G.S. § 7B-101(15) (2021). When a child has been out of the parent's custody for a significant period of time by the point at which the termination proceeding occurs, neglect may be established by a showing that the child was neglected on a previous occasion and the presence of the likelihood of future neglect by the parent if the child were to be returned to the parent's care. *In re J.R.F.*, 380 N.C. 43, 2022-NCSC-5, ¶ 11.

> Evidence of neglect by a parent prior to losing custody of a child — including an adjudication of such neglect — is admissible in subsequent proceedings to terminate parental rights, but the trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect. The determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*.

Id. (extraneity omitted).

¶ 25 The trial court made the following findings of fact which were pertinent to its adjudication:

> 6. That a Juvenile Petition and Non-Secure Custody Order were entered on December 7, 2018, alleging that [Johnny, Janelle, and Joel] are neglected juveniles in that the juveniles did not receive proper care, supervision or discipline from the juvenile's parent, guardian, custodian or caretaker and the children lived in an environment injurious to the juvenile's welfare.
>
> 7. On April 4, 2019, the [c]ourt adjudicated the children . . . neglected juveniles pursuant to N.C.G.S. [§] 7B-101(15).

8. The [c]ourt takes judicial notice of the underlying Juvenile File . . . and [DSS's] efforts to work with [the parents]. The [c]ourt takes particular notice of the adjudication order and subsequent permanency planning hearings orders.

9. The [c]ourt carefully considered the Family Services Case Plan (FSCP). It appears that [respondent-mother] entered into that plan in December 2018 and signed that plan in January 2019. This FSCP consisted of mental health treatment and follow all recommendations, substance abuse treatment and follow all recommendations along with random drug screens, complete parenting classes, obtain and maintain stable housing and employment.

. . . .

11. *Social Worker Supervisor Vanessa McKnight testified about . . . [the parents'] noncompliance in their FSCP.*

. . . .

13. *Social Worker Rolanda Collins testified about her involvement in the case and . . . that the parents were non compliant with their FSCP.* As of the date of the hearing, [the parents] had obtained housing and completed parenting classes. However, as of the date of the hearing, random drug screens were not provided to [DSS] and mental health treatment [sic].

14. *Social Worker Rolanda Collins also testified that she made requests of the parents to submit to random drug screens on November 10, 2020, attempted a home visit to ask the parents on January 11, 2021, sent a text message on January 12, 2021, attempted a home visit on January 13 and 14, 2021.*

. . . .

16. The [c]ourt noted through testimony of Dr. [Sharon] Halliday, that [respondent-mother]

received medication management services but no therapy services from July, 2019 through June, 2020.

17. [Respondent-mother] received substance abuse services from Rapha Clinic from June, 2020 until March, 2021 and her substance abuse treatment is ongoing.

18. Through the testimony of Dr. Halliday and the drug screen exhibits, [respondent-mother] tested positive for Cocaine in July 2020, Amphetamine October 2020 and Oxycodone March 2021.

19. *That Dr. Halliday indicated through her testimony that [respondent-mother] was going weekly to see the Provider for prescriptions and bi-weekly for drug screens during July 2020 until March 2021*. However, during this time, [respondent-mother] would refuse to submit random drug screens for [DSS]. [Respondent-mother] knew what days she would be going to the Rapha Clinic and when she was going to submit to a drug screen. This did not comply with the random drug screen component of her FSCP.

20. *Social Worker Carolyn Collins testified that [DSS] received a referral based on the birth of [respondent-mother's] new baby, [Renee] in May 2020 and the medical records associated with that minor child*. Testimony and medical records showed that the minor child was born positive for Cocaine and had "withdrawals" from this illicit substance. [Respondent-mother] told Social Worker Collins that she had taken a [X]anax during her pregnancy with the minor child [Renee].

21. That the [c]ourt relies on and accepts into evidence an Affidavit with Medical Records regarding the sibling [Renee], in making these findings and finds the said report to both [sic] credible and reliable.

22. That [respondent-mother] nor [the father] has not made reasonable progress in this case

> considering that the FSCP has been in place since 2018 and there is a continued concern for their substance abuse treatment along with random drug screens, and mental health treatment. *[The father] states he has obtained employment but [respondent-mother] has not.*
>
> 23. *Caretaker [grandfather] testified that the parents' visitation was sporadic.* The parents visited at a birthday party recently *and before that, [the grandfather] could not recall visitation between the parents and the minor children.*
>
> 24. *Caretaker [grandfather] testified that the parents have bought some toys and a cellphone for the minor children in the past but that [respondent-mother] and [the father] have not provided any financial support for the care of the minor children while the minor children have been in his home since 2018.*

(Emphasis added.) The italicized portions of these findings are mere recitations of witness testimony rather than affirmative findings of fact. *In re D.T.H.*, 378 N.C. 576, 2021-NCSC-106, ¶ 15 (concluding that when a finding "consist[s] of nothing more than a recitation of respondent-father's testimony, it is not, in actuality, a finding of fact at all."). Therefore, we disregard the trial court's recitations of testimony which were denoted as findings of fact as we review the trial court's adjudication. *See id.* ¶ 8 (citing *In re N.D.A.*, 373 N.C. 71, 75 (2019)).

¶ 26 Respondent-mother challenges Findings of Fact 16 and 17 as presenting an incomplete and "glaringly inaccurate" picture of the evidence of treatment services that she received during the course of the case. Specifically, respondent-mother contends that these findings by the trial court fail to acknowledge Dr. Halliday's testimony that respondent-mother (1) received mental health and substance abuse treatment at RAPHA from January 2019 to May 2019; (2) received additional mental health treatment at RAPHA beginning in January 2020 and continuing at least into June 2020 and possibly into March 2021; and (3) reported to Dr. Halliday that she was receiving substance abuse services from a facility other than RAPHA between February 2020 and June 2020. Respondent-mother argues that Findings of Fact 16 and 17 reflect the trial court's larger failure to make *any findings* about her mental health

treatment and "grossly distort the relevant testimony from [ ]DSS's own witness."

¶ 27 At the termination of parental rights hearing, Dr. Halliday testified that respondent-mother attended mental health therapy sessions at RAPHA from 30 January 2019 to 29 July 2019. Sessions at the facility were held once a month; respondent-mother would attend every other month. As for respondent-mother's utilization of services thereafter, Dr. Halliday testified as follows:

> A. When she came back in February, 2020, she did not enter (inaudible) the program. She said she only wanted to access mental health services, so between January of 2020 to June of 2020, she only accessed mental health services, and then in June of 2020, she decided to resume the substance abuse program.
>
> Q. Okay. So . . . from July of 2019 until maybe January of 2020, there was no substance abuse treatment that was being given to [respondent-mother] through your Rapha Clinic. Correct?
>
> A. . . . [Y]es, from . . . July of 2019 to June of 2020.
>
> Q. Okay.
>
> A. She accessed substance abuse clinic because when she came back, she said she was going to another clinic for substance abuse at some time between then. I'm not sure when.
>
> Q. Okay.
>
> A. But she started going for substance [sic] between January to July. She stopped in July in 2019 and when she came back in January, she came back in the — (inaudible) she only came back for the meds she was on [for] substance abuse treatment.
>
> Q. Okay. Was there —
>
> A. And . . . in June of 2020 she said that she would resume our sessions (inaudible) services at the clinic.

¶ 28 We ascertain that Findings of Fact 16 and 17 provide an accurate account of the evidence regarding the narrow range of facts which were addressed in these disputed findings. While we agree with respondent-mother that the findings do not mention Dr. Halliday's testimony concerning respondent-mother's court-ordered participation in mental health treatment, nonetheless "[t]he trial court is not . . . 'required to make findings of fact on all the evidence presented, nor state every option it considered.' " *In re I.E.M.*, 379 N.C. 221, 2021-NCSC-133, ¶ 13 (quoting *In re E.S.*, 378 N.C. 8, 2021-NCSC-72, ¶ 22). In reviewing other findings of fact related to Findings of Fact 16 and 17 which appear in the trial court's order, the forum expressly cited its "continued concern" about the parents' mental health treatment in Finding of Fact 22 and elected to formulate its sound findings of fact which addressed the subject in this permissible way.

¶ 29 Similarly, Findings of Fact 16 and 17 do not expressly address the evidence of the treatment that respondent-mother received between January and June of 2019. However, this time period predates the initial adjudication and disposition orders entered by the trial court in July 2019 and was approximately two years before the termination hearing. Lastly, regarding these two findings of fact, as for Dr. Halliday's testimony that respondent-mother claimed to receive substance abuse treatment from a source other than RAPHA for an indeterminate period between July 2019 and June 2020, the trial court was not obliged to make a specific finding based on this report of treatment which Dr. Halliday could not confirm or describe, and about which she did not have first-hand knowledge. The trial court was not required to make findings of fact regarding each item of evidence.

¶ 30 Respondent-mother challenges Finding of Fact 18, which describes her positive drug screens, as unsupported by the evidence. A review of the transcript of the termination hearing illustrates that this finding is supported in part and unsupported in part. Although respondent-mother protests the trial court's reliance in Finding of Fact 18 upon "drug screen exhibits", we have already determined that the trial court's consideration of Exhibit P—respondent-mother's drug screens from RAPHA—was proper since the exhibit was part of the juvenile case file. Further, Dr. Halliday testified that respondent-mother tested positive for cocaine on 7 July 2020 and tested positive for oxycodone on 4 January 2021 and 1 February 2021.[11] We shall disregard the March 2021 drug screen

11. Finding of Fact 18 makes no mention of respondent-mother's positive screen for methamphetamine and MDMA on 7 December 2020, which is included in Exhibit P.

date[12] mentioned in Finding of Fact 18 as unsupported by the record and shall recognize as supported by the record the trial court's finding with regard to respondent-mother's positive drug screens for cocaine and oxycodone. *Cf. In re S.M.*, 380 N.C. 788, 2022-NCSC-42, ¶ 24 ("[D]isregard[ing] the extra month included in this finding for purposes of our review.").

¶ 31 Also in her testimony, Dr. Halliday confirmed respondent-mother's positive drug screen for amphetamine on 26 October 2020, but explained that this result did not represent illicit drug use because respondent-mother was prescribed Adderall. *See generally State v. Ward*, 364 N.C. 133, 138 nn.2–3 (2010) (noting that Adderall contains amphetamine, a Schedule II controlled substance). Consequently, we shall disregard this portion of Finding of Fact 18 regarding the presence of amphetamine in respondent-mother's system which, though accurate, does not reflect the tenor of Finding of Fact 18 concerning respondent-mother's positive drug screens which resulted from her illegal use of controlled substances.

¶ 32 Having reviewed each of the trial court's findings of fact which are contested by respondent-mother, this Court addresses her sequential argument that the trial court's findings do not support the tribunal's determinations under N.C.G.S. § 7B-1111(a)(1). Based on its findings of fact, the trial court concluded as follows:

> 4. That grounds exist based on clear, cogent and convincing evidence, to terminate the parental rights of the Respondent mother . . . pursuant to North Carolina General Statute[ ] 7B-1111 in that:
>
> . . . .
>
> b. That Respondent mother . . . ha[s] neglected the minor children in that there was past neglect, as evidenced by the prior adjudication order in the JA files, there is no evidence of changed circumstances of the [sic] and there is a likelihood of future neglect and a likelihood of repetition of neglect[.]

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12. Dr. Halliday testified that she had *a conversation* with respondent-mother in March 2021 about respondent-mother's two positive screens for oxycodone in January and February. This testimony would appear to explain the trial court's error in Finding of Fact 18.

See generally In re Ballard, 311 N.C. 708, 715 (1984) (establishing the "prior neglect and the probability of a repetition of neglect" framework for adjudication); *accord In re J.R.F.*, ¶ 11. Respondent-mother contends that the trial court's findings of fact fail to establish either her prior neglect of the children before they were removed from her custody by DSS in December 2018 or a probability of future neglect if the children were returned to her custody. Based on our own examination of the trial court's findings and the applicable law, we disagree.

¶ 33 On the issue of prior neglect, respondent-mother asserts that "the court made no findings whatsoever addressing past neglect. The *only* effort that the court appears to have made towards addressing past neglect was to acknowledge the existence of the underlying 2019 neglect adjudication order" in Finding of Fact 8. Respondent-mother argues that the entry of the 2019 adjudication order "stands for one thing: the children were adjudicated to be 'neglected juveniles' " and does not satisfy the requirement of N.C.G.S. § 7B-1111(a)(1) that "[r]espondent-[m]other *herself* had neglected [the] children in the past." She further asserts that the 2019 adjudication order lacks any substantive findings that would support an adjudication of neglect and instead only lists a series of alleged events about which a DSS social worker "was informed" by various sources.

¶ 34 We find no merit in respondent-mother's creative depiction. It is well established that a prior adjudication of neglect is sufficient to establish prior neglect for purposes of N.C.G.S. § 7B-1111(a)(1). *In re C.S.*, 380 N.C. 709, 2022-NCSC-33, ¶ 16 ("[E]vidence of neglect by a parent prior to losing custody of a child—including an adjudication of such neglect—is admissible in subsequent proceedings to terminate parental rights" (quoting *In re Ballard*, 311 N.C. at 715)). Moreover, this Court has "clarified that '[i]t is . . . not necessary that the parent whose rights are subject to termination be responsible for the prior adjudication of neglect.' " *Id.* (alterations in original) (quoting *In re J.M.J.-J.*, 374 N.C. 553, 565 (2020)).

¶ 35 In Findings of Fact 6 through 8, the trial court discussed the juvenile petition filed by DSS in 2018 which alleged that Johnny, Janelle, and Joel were neglected in that they did not receive proper care, supervision, or discipline from their parent or caretaker and lived in an injurious environment; the trial court found that the children were adjudicated to be neglected on 4 April 2019; and the trial court took judicial notice of the juvenile case file, including the adjudication order. These findings suffice to establish prior neglect. *See id.*

¶ 36 Equally unavailing is respondent-mother's contention that the 2019 adjudication order lacked proper findings to support the prior adjudication of neglect. Respondent-mother "did not appeal from the trial court's adjudication order. Therefore, [she] is bound by the doctrine of collateral estoppel from re-litigating these findings of fact." *In re T.N.H.*, 372 N.C. at 409 (citing *King v. Grindstaff*, 284 N.C. 348, 356 (1973)). The trial court's findings in the 2019 adjudication order show that respondent-mother's ongoing substance abuse was the cause of her children's prior judicial adjudication as neglected juveniles.

¶ 37 Respondent-mother further argues that the trial court's findings of fact fall short of supporting its conclusion that there is a "likelihood of future neglect" if the children were returned to her custody. In characterizing this case as a matter in which "the 'likelihood of future neglect' is based entirely on [her] case plan noncompliance[,]" respondent-mother incorporates by reference the arguments in her brief which challenge the trial court's conclusion that she willfully failed to make reasonable progress under N.C.G.S. § 7B-1111(a)(2).

¶ 38 Respondent-mother reiterates assertions that she advanced regarding her perceived shortcomings of the trial court's findings of fact in her dispute of the forum's determination of the existence of grounds to terminate her parental rights. She maintains that the trial court failed to make any findings about her pursuit of mental health treatment, other than to express its "continued concern" about the issue. Respondent-mother reprises her stance that the trial court's "scant findings" do not allow for a valid assessment of whether her progress through substance abuse treatment was reasonable under the circumstances. Respondent-mother also submits that the trial court did not make any findings of fact about her "many recent negative [drug] screens" which were introduced at the termination of parental rights hearing, about the severity of her substance abuse diagnosis, or about the significance of her occasional illicit drug use during her course of treatment. In light of these claimed omissions, respondent-mother argues that the trial court failed to enter a "proper order" allowing for effective appellate review. On the other hand, she emphasizes the favorable finding of fact in the trial court's order that she "had obtained housing and completed parenting classes" as required by her case plan.

¶ 39 Respondent-mother's effort to persuasively identify the legal inadequacy of the trial court's conclusion about the likelihood of future neglect because the determination was "based entirely on [her] case plan noncompliance" is not supported by this Court's own directives. "A parent's failure to make progress in completing a case plan is indicative

of a likelihood of future neglect. At the same time, a parent's compliance with his or her case plan does not preclude a finding of neglect." *In re A.N.H.*, 381 N.C. 30, 2022-NCSC-47, ¶ 40 (extraneity omitted). Our inquiry under N.C.G.S. § 7B-1111(a)(1) thus does not constitute an inventory of respondent-mother's itemized attainments of the various components of her case plan. It is also distinct from the question of whether she willfully failed to make reasonable progress under the circumstances to correct the conditions which led to the removal of her children under N.C.G.S. § 7B-1111(a)(2).

¶ 40 In this case, the children's prior adjudication of neglect in 2019 was entirely based on incidents and circumstances arising from respondent-mother's long history of substance abuse. No other factors were mentioned in the adjudication order entered on 16 July 2019.

¶ 41 The findings of fact included in the termination order—specifically, the valid portions of Findings of Fact 13 and 16 through 21—show that respondent-mother had failed to resolve her substance abuse issues to a degree that would allow her to reliably care for Johnny, Janelle, and Joel. Despite intervals of treatment, respondent-mother continued to use illicit substances, even during her pregnancy with her daughter Renee, resulting in the child Renee being born in May 2020 with cocaine in her system, thus forcing the infant to go through symptoms of withdrawal. Even at the time of the termination of parental rights hearing, respondent-mother had recently tested positive for the opioid oxycodone despite receiving buprenorphine and gabapentin as part of her ongoing substance abuse treatment at RAPHA.

¶ 42 The findings of fact contained in the trial court's order also demonstrate respondent-mother's periodic refusal throughout the pendency of the case to submit to random drug screens requested by DSS as required by her case plan. Respondent-mother's ongoing substance abuse issues which continued to cast doubt upon her ability to responsibly parent the juveniles are further noted in the trial court's Finding of Fact 19, as the trial court determined that respondent-mother's positive drug screens were obtained even though she "knew what days she would be going to the Rapha Clinic and when she was going to submit to a drug screen."[13]

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13. Social Worker Collins testified that respondent-mother "would go to the Rapha Center on a specific day of the week . . . to pick up her medications and may have a drug screen, may not, so that's why we wanted a random [screen]." Respondent-mother argues that drug screening at RAPHA incorporated "a degree of randomness" in that she was not tested every time she went to the clinic for her medications. However, respondent-mother knew in advance the specific day and time that she would be going to RAPHA and might be subject to screening. As Social Worker Collins testified, "[DSS] does not look at that as a random drug screen."

¶ 43 Respondent-mother also faults the trial court for declining to include any findings of fact based upon her evidence of negative drug screens between 23 March 2021 and 11 May 2021 at Integrity Wellness Center, a treatment clinic for opiate dependence. However, these drug screens were administered when respondent-mother began her involvement with the center on 23 March 2021 and they continued to be predictably rendered at her subsequent weekly scheduled appointments. Therefore, these drug screens were not the type of random drug screens which were required by respondent-mother's case plan, and hence they did not measure respondent-mother's compliance with the same degree of enforcement and oversight.[14] Furthermore, the trial court's Findings of Fact 16, 17, and 19 credit respondent-mother's participation in medication management and other substance abuse treatment at RAPHA between July 2019 and March 2021, and acknowledge that "her substance abuse treatment [was] ongoing" at the time of the hearing. As we earlier observed, the trial court is not required in its findings of fact to catalog each of respondent-mother's negative drug screens during her treatment.[15] *See generally In re I.E.M.*, 379 N.C. 221, 2021-NCSC-133, ¶ 13 (providing that the trial court need not enter findings on each piece of evidence presented).

¶ 44 We hold that the trial court's findings of respondent-mother's continued substance abuse—including her use of controlled substances in a manner harmful to her daughter Renee during the time approaching the birth of the child—combined with her refusal to regularly comply with her case plan's requirement to submit to random drug screens support the trial court's conclusion pursuant to N.C.G.S. § 7B-1111(a)(1) that respondent-mother was likely to subject Johnny, Janelle, and Joel to further neglect if these three juveniles were returned to her custody. While we recognize that the trial court did not address in its findings of fact all facets of respondent-mother's case plan, including such issues as respondent-mother's visitation with the children and her contribution to the children's cost of care, nonetheless in light of the circumstances leading to the children's prior adjudication of neglect in 2019

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14. Rodney Taylor, the clinical director of Integrity Wellness Center, testified that he considered the 23 March 2021 drug screen to be random because it was administered the day that respondent-mother first "came in as a new patient."

15. We note that respondent-mother's drug screen from 11 May 2021 registered positive for a metabolite of naloxone, a medication given to reverse an opioid overdose, in addition to buprenorphine, gabapentin, and amphetamine. *Naloxone*, Substance Abuse and Mental Health Servs. Admin., https://www.samhsa.gov/medication-assisted-treatment/medications-counseling-related-conditions/naloxone (last updated Apr. 21, 2022).

and respondent-mother's pervasive longstanding issue with substance abuse, the trial court's order is sufficient to demonstrate that there is a likelihood of further neglect if Johnny, Janelle, and Joel were returned to her custody. *See In re M.S.L.*, 380 N.C. 778, 2022-NCSC-41, ¶ 21; *In re A.S.T.*, 375 N.C. 547, 555 (2020) ("The trial court's findings of fact show that [the juvenile] was adjudicated to be a neglected juvenile due to the substance abuse issues of both respondent and the mother. Respondent has failed to appreciably address his substance abuse issues."); *see also In re M.Y.P.*, 378 N.C. 667, 2021-NCSC-113, ¶ 20 ("[S]ubstance abuse was also identified as an area of need for services, and the trial court could properly conclude that failure to address this issue could lead to a repetition of neglect.").

¶ 45 We are not persuaded by respondent-mother's challenge to the trial court's statement in its conclusion of law that "there is no evidence of changed circumstances." The trial court's findings of fact indicate that it considered respondent-mother's participation in substance abuse treatment as well as her achievements of completing parenting classes and obtaining permanent housing with the father. We are satisfied that the trial court used the phrase "changed circumstances" in the context of the appearance or realization of new conditions which came into existence to either cure or ameliorate the causes of the prior neglect. *See, e.g.*, *In re J.R.F.*, 380 N.C. 43, 2022-NCSC-5, ¶ 11. The trial court did not err in concluding that the developments cited by respondent-mother were not sufficiently significant to obviate the likelihood of further neglect in this case.

¶ 46 Because we affirm the trial court's adjudication under N.C.G.S. § 7B-1111(a)(1), we do not consider respondent-mother's arguments which contest the trial court's determinations under N.C.G.S. § 7B-1111(a)(2) and (3). *In re J.I.G.*, 380 N.C. 747, 2022-NCSC-38, ¶ 8.

C. Cumulative error

¶ 47 **[3]** In her remaining argument on appeal, respondent-mother asserts that the trial court's "many errors, even if harmless in isolation, cumulatively deprived [her] of her due process right to a fundamentally fair proceeding." She seeks to invoke the principle of "cumulative error" which this Court has applied on rare occasions when reviewing a criminal conviction. Under this doctrine, "[c]umulative errors lead to reversal when 'taken as a whole' they 'deprived [the] defendant of his due process right to a fair trial free from prejudicial error.' " *State v. Wilkerson*, 363 N.C. 382, 426 (2009) (second alteration in original) (quoting *State v. Canady*, 355 N.C. 242, 254 (2002)).

¶ 48 As respondent-mother concedes, we have not previously recognized the theory of cumulative error in a termination of parental rights proceeding or in civil cases generally. She cites the Court of Appeals opinion in *Maldjian v. Bloomquist*, 275 N.C. App. 103 (2020), as "signal[ing] that review for cumulative error is appropriate in a civil context." The lower appellate court in *Maldjian* merely determined that "the trial court's rulings cannot cumulatively be deemed prejudicial error" because they were not individually erroneous. *Id.* at 125. Nowhere in the *Maldjian* opinion—a pronouncement which is illuminating rather than controlling authority when presented to this Court—appears an indication that civil cases are eligible for cumulative error analysis as a matter of course. This Court is not inclined to expand this scarcely utilized doctrine, which emanates from considerations spawned by the protections of criminal law, to this termination of parental rights matter. Having carefully reviewed each of respondent-mother's vigorous challenges to the trial court's evidentiary rulings and its findings of fact, we are satisfied that respondent-mother has not been deprived of her constitutional right to due process and a fundamentally fair proceeding. The trial court entered a written order explaining its decision with sufficient substance to allow this Court to undertake meaningful appellate review. Accordingly, respondent-mother's cumulative error argument is unpersuasive.

III. Conclusion

¶ 49 We conclude that the trial court properly exercised subject matter jurisdiction in this case pursuant to N.C.G.S. § 7B-1101. We further hold that the trial court did not err in determining the existence of grounds to terminate respondent-mother's parental rights to the juveniles Johnny, Janelle, and Joel under N.C.G.S. § 7B-1111(a)(1) on the basis that the children were neglected juveniles and would likely suffer further neglect if returned to respondent-mother's care. The termination of parental rights order is hereby affirmed.

AFFIRMED.

IN RE K.N.

[381 N.C. 823, 2022-NCSC-88]

IN THE MATTER OF K.N.

No. 110A19-2

Filed 15 July 2022

Civil Procedure—Rules 52 and 63—order terminating parental rights—new findings made by substitute judge without hearing evidence—improper judicial action

An order terminating a father's parental rights to his child was vacated as a nullity where, after a prior termination order was vacated on appeal, remanded, and the matter assigned to a substitute judge (due to the original judge being deceased), the substitute judge acted in a judicial and not merely a ministerial manner by making new findings—beyond what appeared in the initial order—based on evidence the judge did not personally hear. Civil Procedure Rules 52 and 63 do not permit a substitute judge who did not preside over a matter to make new findings of fact and conclusions of law.

Appeals pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 29 March 2021 by Chief Judge Teresa H. Vincent in District Court, Guilford County. This matter was calendared for argument in the Supreme Court on 1 July 2022 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Mercedes O. Chut for petitioner-appellee Guilford County Department of Health and Human Services.

Erica M. Hicks for appellee Guardian ad Litem.

Jeffrey William Gillette for respondent-appellant father.

HUDSON, Justice.

¶ 1 Respondent-appellant appeals from the trial court's 29 March 2021 order terminating his parental rights asserting violations of Rules 52 and 63 of the North Carolina Rules of Civil Procedure. Upon review, we vacate the order of the trial court and remand for a new hearing.

I. Factual and Procedural Background

¶ 2 This is the second time our Court has heard an appeal in this case. For a thorough discussion of all background material, we refer the

reader to our prior opinion. *In re K.N.*, 373 N.C. 274 (2020). Here, we discuss only those background and procedural facts relevant to this appeal.

¶ 3 Respondent is the biological father of Keith.[1] On 6 February 2017 the Guilford County Department of Health and Human Services (DHHS) filed a petition alleging that Keith was neglected and dependent. On 21 July 2017 the district court found Keith to be neglected and dependent. On 15 March 2018 DHHS filed a petition to terminate respondent's parental rights. On 28 November 2018 the district court terminated respondent's parental rights to Keith.

¶ 4 In its termination order, the court highlighted respondent's incarceration and pending criminal charges; his housing situation; his "diluted" and delayed drug tests; his lack of steady income; and his alleged failure to complete a Domestic Violence Intervention Program.

¶ 5 Respondent appealed the termination of his parental rights. *In re K.N.*, 373 N.C. at 277. On 24 January 2020 we vacated the district court's termination order and remanded the case for further proceedings. *Id.* at 285. Our Court held that some of the findings in the district court's order—specifically, that respondent had not completed a required Domestic Violence Intervention Program—were not supported by the evidence. *Id.* at 281. We further held that the remaining findings of fact enumerated in the district court's order were insufficient to support a determination that respondent neglected Keith. *Id.* at 284. In fact, many of the district court's written findings indicated that respondent was complying with his case plan. We observed that "[t]he only factual finding that directly addresses respondent's ability to care for Keith" is the finding that respondent was incarcerated and awaiting trial at the time of the termination hearing. *Id.* at 282. Our case law squarely establishes that "incarceration, by itself, cannot serve as clear, cogent, and convincing evidence of neglect." *Id.* at 282–83. Only when the court finds that the unique circumstances, beyond the mere fact of incarceration, suggest neglect is likely, can this fact weigh in favor of termination. The district court's order did not reflect this type of analysis, and we so held. *Id.*

¶ 6 At the same time, we noted that "the trial court *could* have made additional findings of fact . . . that might have been sufficient to support" an order terminating respondent's parental rights to Keith. *Id.* at 284. We pointed to other evidence in the record, such as respondent's history of drug abuse, that could potentially weigh in favor of termination. We also noted, as discussed in the paragraph above, that a more detailed

1. Pseudonym used to protect the child's identity.

analysis of the circumstances of respondent's incarceration might also support termination. But we were clear that any future order terminating respondent's parental rights would need to be sufficiently supported by "appropriate" findings, additional explanation, or some combination of both. *Id.* at 284–85. Thus, we explicitly noted that the trial court, on remand, "shall have the discretion to determine whether the receipt of additional evidence is appropriate." *Id.* at 285.

¶ 7 On remand, the matter was assigned to a substitute judge. Tragically, the original district court judge, the Honorable Judge H. Thomas Jarrell, had passed away in August 2019. In a pre-trial conference following remand, respondent's newly appointed attorney initially objected to assigning a substitute judge to revise a vacated order based on evidence the substitute judge did not hear. However, on 18 September 2020, all parties agreed that the matter could be assigned to Chief District Court Judge Teresa H. Vincent per Rule 63.

¶ 8 On 5 January 2021, Chief Judge Vincent heard from the parties at a pre-trial conference. In a written order signed on 15 January 2020 and filed on 20 January 2020, the Chief Judge indicated her intent to review the record, the trial transcripts, and any proposed findings of fact that the parties wished to submit for consideration. While Chief Judge Vincent acknowledged that she could, in her discretion, reopen the evidence, she did not hold any additional hearings.

¶ 9 On 29 March 2021 Chief Judge Vincent issued a new order finding that Keith was neglected and terminating respondent's parental rights. This new order directly addressed many of the deficiencies in the first termination order that our Court had identified. For example, the old termination order only briefly touched on respondent's criminal record: "[Respondent] was to cooperate with the terms of his probation. [Respondent] was to resolve his pending criminal charges and not incur any new criminal charges. [Respondent] has violated his probation and his case plan by incurring new charges." In contrast, the new termination order analyzed respondent's criminal history at length, and explained why this history supported termination:

> [Respondent] has a history of engaging in a criminal lifestyle that has prevented him from providing an appropriate and safe home for the juvenile in the past. Given [respondent's] criminal record, probation violations, and lack of progress in resolving his involvement with the criminal justice system, there is a high likelihood that [Keith] would be neglected if he were returned to [respondent's] care.

In another example, the old termination order simply noted that respondent had submitted several "diluted" drug tests, and that on one occasion he had delayed taking a drug test. The new termination order went much further:

> [Respondent] has a long history of substance abuse problems, as demonstrated by his many convictions on drug-related charges and the diagnosis by his former counselor Mr. Albert Linder of alcohol use disorder (severe), cocaine use disorder (severe in full remission), and marijuana use disorder (mild to moderate), as well as anxiety disorder and post-traumatic stress disorder. [Respondent's] dilatory tactics with respect to the random drug screening required by his case plan indicates lack of genuine progress in overcoming substance abuse problems. By way of example, on three separate occasions, in June, July, and August of 2018 [respondent] submitted diluted drug screens for which he did not provide a plausible explanation. Ultimately [respondent] waited three days before providing another (negative) drug screen in August of 2018. Albert Linder, [respondent's] therapist, testified that [respondent's] recent DUI charge may indicate a relapse into drug use. The Court finds Mr. Linder's testimony to be credible. [Respondent's] pattern of providing diluted drug screens and postponing further drug testing indicates that he is not cooperating with the Department, is attempting to manipulate the testing, and has used illicit substances. Given his many convictions for crimes involving drugs or drug paraphernalia, [respondent's] substance abuse is intertwined with his criminal recidivism and lifestyle. Therefore, substance abuse has negatively impacted [respondent's] life and ability to care for the juvenile. In spite of superficial progress with his case plan, as a result of his inability to demonstrate sustained sobriety, [respondent's] neglect of the child is ongoing, and there is a high likelihood of repetition of neglect should the Court return the juvenile to [respondent's] care.

¶ 10 Respondent appeals the Chief Judge Vincent's 29 March 2021 order terminating his parental rights.

II. Analysis

¶ 11 On appeal, respondent argues that the trial court's order terminating his parental rights was null and void because Chief Judge Vincent, as a Rule 63 substitute judge, lacked authority to make new, dispositive findings of fact under Rule 52. Respondent claims that the trial court's reliance on Rule 63 is misplaced, as that rule does not permit a substitute judge who did not hear the case to perform non-ministerial acts like making new findings of fact and reviving a previously vacated order. Respondent asks this Court to vacate the 29 March 2021 termination order and to remand the matter for a new trial. Because we conclude the trial court did so err, we vacate the judgment of the trial court and remand for a new hearing on the termination of respondent's parental rights.

A. Standard of Review

¶ 12 Respondent argues the trial court failed to comply with Rule 52 and Rule 63 of the North Carolina Rules of Civil Procedure. This Court recently set out the standard of review for compliance with the Rules of Civil Procedure:

> The North Carolina Rules of Civil Procedure are part of the General Statutes. Accordingly, interpreting the Rules of Civil Procedure is a matter of statutory interpretation. A question of statutory interpretation is ultimately a question of law for the courts. We review conclusions of law de novo.

In re E.D.H., 2022-NCSC-70, ¶ 10 (cleaned up). "We review a trial court's adjudication under N.C.G.S. § 7B-1111 to determine whether the findings are supported by clear, cogent, and convincing evidence and the findings support the conclusions of law. The trial court's conclusions of law are reviewable de novo on appeal." *In re S.C.L.R.*, 378 N.C. 484, 2021-NCSC-101, ¶ 15 (cleaned up).

B. Preservation

¶ 13 As an initial matter, we note that DHHS and the Guardian ad Litem argue that respondent's arguments based on Rules 52 and 63 are waived because respondent failed to raise them before the trial court below. Rules 52 and 63, however, impose mandates on the trial court to act. As we have stated, "[i]t is well established that when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial." *State v. Chandler*, 376 N.C. 361, 366 (2020). Because Rules 52 and 63 impose statutory mandates, and

because failure to ensure the finder of fact has personal knowledge of the case prejudices respondent, we conclude that respondent's arguments are preserved.

C. Merits of Respondent's Arguments

¶ 14 We now consider the merits of respondents' arguments under Rule 52 and Rule 63. Rule 52 of the North Carolina Rules of Civil Procedure states that "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." N.C.G.S. § 1A-1, Rule 52(a)(1) (2021).

¶ 15 Rule 63 provides as follows:

> If by reason of death . . . a judge before whom an action has been tried or a hearing has been held is unable to perform the duties to be performed by the court under these rules after a verdict is returned or a trial or hearing is otherwise concluded, then those duties, including entry of judgment, may be performed:
>
> . . .
>
> (2) In actions in the district court, by the chief judge of the district. . . .
>
> If the substituted judge is satisfied that he or she cannot perform those duties because the judge did not preside at the trial or hearing or for any other reason, the judge may, in the judge's discretion, grant a new trial or hearing.

N.C.G.S. § 1A-1, Rule 63 (2021).

¶ 16 We have recently held that "one of the 'duties to be performed by the court under these rules,' N.C.G.S. § 1A-1, Rule 63, is finding the facts, stating the conclusions of law, and directing the entry of judgment pursuant to Rule 52." *In re E.D.H.*, 2022-NCSC-70, ¶ 13. Accordingly, we summarized our caselaw construing Rule 52 and Rule 63 together as follows:

> [T]his Court has interpreted Rules 52 and 63 together to provide that a substitute judge cannot find facts or state conclusions of law in a matter of which he or she did not preside. Conversely . . . if [the trial

> court judge] made the findings of fact and conclusions of law that appear in the order before retiring and [the] Chief Judge . . . did nothing more than put his signature on the order and enter it ministerially, the order is valid.

Id. at ¶ 13 (cleaned up).

¶ 17 Under the general rule, a substitute judge who did not preside over the matter lacks the power to find facts or state conclusions of law. In *In re C.M.C.*, for instance, this Court considered whether two orders terminating parental rights were valid. The initial order at issue was signed by a different judge than the one who presided over the hearing. That order was subsequently vacated and a second order was entered that was signed by the same judge who conducted the hearing. 373 N.C. 24, 25–27 (2019). We held "that the initial termination orders signed by [the substitute judge] were . . . a nullity." *Id.* at 28. Nevertheless, we ultimately affirmed the trial court because the trial court's subsequent actions issuing a new order corrected the error introduced by the improperly signed order. *Id.* at 29.

¶ 18 Here, the substitute judge made findings of fact and conclusions of law drawn from those findings in the 29 March 2021 termination order despite not having presided over the original trial. This action contravenes the requirements of Rule 52 and Rule 63, which implicitly prohibit a substitute judge from doing so. Under these rules and *In re C.M.C.*, we must conclude the order is "a nullity." *Id.* at 28.

¶ 19 In *In re E.D.H.*, our most recent case addressing Rules 52 and 63, we reaffirmed the approach of *In re C.M.C.* "provid[ing] that a substitute judge cannot find facts or state conclusions of law in a matter over which he or she did not preside," *In re E.D.H.*, 2022-NCSC-70, ¶ 13 (citing *In re C.M.C.*, 373 N.C. 24, 28 (2019)), this Court affirmed a substitute judge's signing and entering an order where the findings of fact and conclusions were made by the retired judge. *Id.* at ¶ 15. However, in that case, the Court held that the act was permitted by Rules 52 and 63 because it was ministerial and because a presumption of regularity attached to the act. *Id.* The Court specifically noted the respondent failed to show that the substitute judge "signed the order despite not knowing whether [the retired judge] made the findings of fact and conclusions of law that appear in it." *Id.* at ¶ 17.

¶ 20 Unlike *In re E.D.H.*, this case does not fall into the class of cases where the substitute judge acted ministerially, merely signing an order, for which findings of fact and conclusions had been made by the

unavailable judge. Rather, here, Chief Judge Vincent found further facts beyond those in the vacated order, despite not hearing any of the evidence. Moreover, even where her 29 March 2021 order reapplied facts found by the deceased judge, that was not in keeping with Rules 52 and 63, because the original order was fully vacated by this Court in our judgment and mandate, rendering it a nullity. Accordingly, Chief Judge Vincent engaged in distinctly judicial and not ministerial action by making findings of fact and conclusions of law despite not personally hearing the evidence, contravening Rules 52 and 63 as interpreted by this Court in *In re C.M.C.* and *In re E.D.H.*

¶ 21 Nevertheless, DHHS argues in its brief that *In re C.M.C.* does not apply to this case because the opinion does not mention Rule 63 and the two decisions of our Court of Appeals relied on by this Court in that decision were issued before Rule 63 was amended in 2001. DHHS argues this amendment to the rule resulted in a change in its meaning such that, under the present version of the rule, a substitute judge may enter findings of fact and conclusions of law on behalf of the original, unavailable judge. DHHS notes that originally Rule 63 read in pertinent part as follows:

> If by reason of death, . . . a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules *after a verdict is returned or findings of fact and conclusions of law are filed, then those duties may be performed. . .*
>
> . . .
>
> (2) In actions in the district court, by the chief judge of the district, . . .

N.C.G.S. § 1A-1, Rule 63 (1999) (emphasis added). The present version of Rule 63, which now provides that a substitute judge may act "after a verdict is returned or a trial or hearing is otherwise concluded," was enacted 18 August 2001 by S.L. 2001-379, § 7, 2001 N.C. Sess. Laws 1222, 1236. DHHS argues that, unlike the original version of the language, nothing in the current version of Rule 63 bars the substitute judge from entering findings of fact and conclusions of law, constrained only by the substitute judge's own discretion.

¶ 22 We are not persuaded by this argument. DHHS effectively asks this Court to overrule our caselaw on Rule 63 drawing a line between "ministerial" and "judicial" functions because the amendment signaled

a change in the functions which a substitute judge is permitted to perform. But based on the plain meaning of the words, the more logical interpretation is that the legislature modified the rule to expand the time in a case at which a substitute judge might step in from the conclusion of a trial or hearing to entry of judgment, and not merely from the filing of findings of facts or conclusions of law to entry of judgment. Accordingly, we conclude that the amendment to Rule 63 by Session Law 2001-379, § 7 did not modify the functions which a substitute judge is permitted to perform.

¶ 23 Furthermore, it makes no difference to our analysis that this Court specifically provided in our remand instructions that the trial court "shall have the discretion to determine whether the receipt of additional evidence is appropriate." *In re K.N.*, 373 N.C. at 285. That instruction did not contemplate the death or unavailability of the original district court judge and, in particular, did not override the need to comply with the Rules of Civil Procedure on remand, including the requirement of Rules 52 and 63 that a substitute judge not find facts or enter conclusions based on evidence he or she did not hear. Accordingly, with the original order vacated, the proper action for the substitute judge was to order a new hearing.

III. Conclusion

¶ 24 We conclude the trial court erred in entering new findings of fact and conclusions of law without conducting a new hearing. The function of finding facts is specific to the judge who presides over a non-jury civil trial or hearing, as only that judge has the opportunity to observe the witnesses and weigh the evidence. We hold a substitute judge may not make new factual findings or conclusions of law under Rule 52 and Rule 63. Accordingly, we vacate the 29 March 2021 order of the trial court terminating respondent's parental rights and remand for a new hearing.

VACATED AND REMANDED.

IN RE M.C.

[381 N.C. 832, 2022-NCSC-89]

IN THE MATTER OF M.C., M.C., AND M.C.

No. 260A21

Filed 15 July 2022

Termination of Parental Rights—grounds for termination—failure to pay a reasonable portion of the cost of care—gifts, clothing, and birthday party

The trial court's order terminating respondent-father's parental rights in his children on the grounds of willful failure to pay a reasonable portion of the cost of care was affirmed where, during the relevant six-month period, he had the ability to pay more than zero dollars toward the cost of his children's foster care but failed to pay any amount to the department of social services or the foster parents. His sporadic provision of lunch, gifts, and clothing for the children and a birthday party for his daughter did not preclude the trial court's finding that he failed to pay a reasonable portion of the cost of the children's care.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 9 April 2021 by Judge Resson O. Faircloth in District Court, Harnett County. This matter was calendared in the Supreme Court on 1 July 2022 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Duncan B. McCormick, Staff Attorney, for petitioner-appellee Harnett County Department of Social Services.

Mobley Law Office, P.A., by Marie H. Mobley, for appellee Guardian ad Litem.

Wendy C. Sotolongo, Parent Defender, and Jacky Brammer, Assistant Parent Defender, for respondent-appellant father.

HUDSON, Justice.

¶ 1 Respondent-father appeals from the trial court's order terminating his parental rights in M.C. (Michael), M.C. (Monica), and M.C. (Maxine).[1] We affirm.

1. Pseudonyms are used in this opinion to protect the juveniles' identity and for ease of reading.

I. Factual and Procedural Background

¶ 2 Michael, Monica, and Maxine were born in February 2014, June 2015, and August 2016, respectively. On 23 August 2017, the Harnett County Department of Social Services (DSS) obtained nonsecure custody of Michael, Monica, and Maxine and filed juvenile petitions alleging them to be neglected juveniles. The petitions alleged a family history with DSS and Cumberland County Department of Social Services dating back to 2015. On 12 May 2015, DSS began working with the family after "several severe incidences of domestic violence between the parents" while in Michael's presence. Respondent-parents' relationship "continued with the same pattern of violence" over the next two years.

¶ 3 Domestic violence was not the only concern. The petitions further alleged that respondent-parents "would use illegal drugs and non-prescribed medications while caring for the children" and "would leave the children with family members . . . for several months" without providing "information as to where they were going or when they would return." At Maxine's birth in 2016, she tested positive for barbiturates, and respondent-mother tested positive for marijuana, benzodiazepines, and cocaine. On 17 March 2017, respondent-father "threatened to kill the children while they were in his care" and "refused to return them" to respondent-mother. Shortly thereafter, respondent-father was arrested on charges of identity theft and possession with intent to sell and deliver cocaine. He was imprisoned at the Craven County Correctional Institute and was expected to remain there for twelve to twenty-five months.

¶ 4 After hearing the juvenile petitions on 22 September 2017, the trial court entered an order the same day adjudicating the children to be neglected juveniles. Both parents were ordered to enter into a family services agreement. Pertinent to this appeal, respondent-father was required to comply with seven directives: (1) contact DSS upon release from incarceration; (2) participate in any services or programs available in jail or prison and provide documentation of his progress to DSS and the trial court; (3) cooperate with a substance abuse assessment and follow all recommendations; (4) complete a domestic violence assessment and follow all recommendations; (5) obtain and maintain employment upon release from incarceration and demonstrate an ability to financially care for his children; (6) obtain and maintain appropriate housing upon release from incarceration; and (7) sign releases for information as requested by DSS and the guardian ad litem.

¶ 5 Following a permanency planning hearing on 15 December 2017, the trial court entered an order on 7 February 2018 finding that respondent-father remained incarcerated with a projected release date

of April 2018. The primary permanent plan was set as reunification, with a secondary plan of guardianship. The trial court also set a third permanent plan of adoption. The trial court granted respondent-father a minimum of one hour of weekly supervised visitation upon his release from incarceration.

¶ 6 Following a permanency planning hearing on 10 August 2018, the trial court entered an order finding that although respondent-father had been released from prison in April 2018, he was currently incarcerated in Harnett County on pending charges dating from 2016. The trial court changed the primary permanent plan to adoption, with a secondary plan of guardianship and a concurrent secondary plan of reunification.

¶ 7 Following a permanency planning hearing on 2 November 2018, the trial court entered an order on 11 January 2019 finding that although respondent-father was "able to . . . send cards and letters" to his children while incarcerated, he had failed to do so. Respondent-father's projected release date from Harnett County was in January 2019.

¶ 8 Following a permanency planning hearing on 29 March 2019, the trial court entered an order on 23 May 2019 finding that respondent-father had been released from prison in February 2019, that respondent-father had participated in two visits with his children since his release, and that the "children know him" and the visits "went well." The court further found that on 12 March 2019, respondent-father had completed a substance abuse assessment which recommended he abstain from marijuana use; however, on 13 March 2019, he failed to appear for a drug screen. He attended an intake session at HALT, a domestic violence treatment program, but reported not being able to continue with the program because he could not afford the program fees. Respondent-father further reported obtaining housing and employment and earning about $250 per week. The trial court set the primary permanent plan as adoption, with a secondary permanent plan of reunification with respondent-father.

¶ 9 On 17 July 2019, DSS filed a motion to terminate respondent-father's parental rights to Michael, Monica, and Maxine on the grounds of neglect, willful failure to make reasonable progress, and failure to pay for a reasonable portion of the cost of care for the juveniles.[2] *See* N.C.G.S. § 7B-1111(a)(1)–(3) (2021). Following a hearing on 31 July 2020 on the

2. Although DSS also filed to terminate respondent-mother's parental rights, she is not a party to this appeal. In November 2019, DSS dismissed the TPR motion as to respondent-mother after she relinquished her parental rights.

motion to terminate respondent-father's parental rights, the trial court entered an order on 9 April 2021 determining that three grounds existed to terminate his parental rights as alleged in the petition. The trial court also concluded that it was in the children's best interests that respondent-father's parental rights be terminated. *See id.* § 7B-1110(a) (2021). Respondent-father timely appealed.

II. Analysis

¶ 10 On appeal, respondent-father challenges the trial court's adjudication of the existence of grounds to terminate his parental rights in Michael, Monica, and Maxine.

> When reviewing the trial court's adjudication of grounds for termination, we examine whether the court's findings of fact are supported by clear, cogent and convincing evidence and whether the findings support the conclusions of law. Any unchallenged findings are deemed supported by competent evidence and are binding on appeal. The trial court's conclusions of law are reviewed de novo.

In re Z.G.J., 378 N.C. 500, 2021-NCSC-102, ¶ 24 (cleaned up). "[A]n adjudication of any single ground in N.C.G.S. § 7B-1111(a) is sufficient to support a termination of parental rights." *In re E.H.P.*, 372 N.C. 388, 395 (2019).

¶ 11 A trial court may terminate parental rights pursuant to N.C.G.S. § 7B-1111(a)(3) when:

> The juvenile has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent has for a continuous period of six months immediately preceding the filing of the petition or motion willfully failed to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

N.C.G.S. § 7B-1111(a)(3) (2021). Regarding this ground for termination, this Court has held:

> The cost of care refers to the amount it costs the Department of Social Services to care for the child, namely, foster care. A parent is required to pay that portion of the cost of foster care for the child that is

> fair, just and equitable based upon the parent's ability or means to pay.

In re J.M., 373 N.C. 352, 357 (2020) (cleaned up).

¶ 12 In the present case, the trial court made the following pertinent findings of fact in support of its conclusion that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(3) to terminate respondent-father's parental rights:

> 65. The six-month period immediately preceding the filing of the motion to terminate parental rights was January 17, 2019 to July 17, 2019.
>
> 66. The juveniles were in a foster care placement in the relevant six-month period.
>
> 67. The room and board and child-care costs for each of the juveniles exceeded $14,000 during the six-month period.
>
> 68. The father was in prison until mid-February 2019. He returned to jail in June 2019.
>
> 69. The father was employed while he was out of prison during the relevant six-month period. He earned about $8 per hour and $250 per week.
>
> 70. The father did not make any child support payments or provide financial support for the children between January 17, 2019 and July 17, 2019.
>
> 71. The father did not make any child support payments or provide financial support for the children at any time after the filing of the underlying juvenile petitions.
>
> . . . .
>
> 73. The father had the ability to pay more than zero dollars in child support or financial support of the children to contribute to their cost of care in the six-month period immediately preceding the filing of the juvenile petitions.
>
> 74. The father paid for a birthday party at Chuck E. Cheese to celebrate [Monica]'s birthday in June 2019. He brought toys for all of the juveniles. He brought shoes and clothing for all of the juveniles.

¶ 13 Respondent-father challenges findings of fact 70 and 71, arguing that the trial court's findings that he did not provide any financial support after the underlying juvenile petitions were filed or during the relevant six-month period are not supported by the evidence. Specifically, respondent-father directs our attention to finding of fact 74 and undisputed testimony demonstrating that he paid for lunch for his children during a visitation, provided gifts, shoes, and clothes for his children on more than one occasion, and paid for Monica's birthday party at Chuck E. Cheese in June 2019. Additionally, respondent-father argues that because he provided some of this support during the relevant six-month period, the trial court was required to make a finding that he "was able to pay more than he did, not just more than zero." We are not persuaded.

¶ 14 This Court's recent holding in *In re D.C.*, 378 N.C. 556, 2021-NCSC-104, is instructive on this issue. There, the trial court made unchallenged findings that the respondents were physically able to work, started a small business during the relevant six-month period, and reported that the business earned enough income to support themselves and their children. *Id.* ¶¶ 15–16. Although the trial court found that the respondents "provided the juvenile with "some food and gifts at visitation" and also gave the juvenile "some small amount of spending money," the court also found that they did not pay any child support or give DSS or the foster parents any money that would cover a reasonable portion of the cost of care for the juvenile. *Id.* ¶ 15. On appeal, this Court affirmed termination of the respondents' parental rights under N.C.G.S. § 7B-1111(a)(3) because "[t]he trial court's unchallenged findings of fact demonstrate[d] that respondents had the ability to pay a reasonable portion of [the juvenile]'s cost of care *but failed to pay any amount to DSS or the foster parents toward cost of care.*" *Id.* ¶ 20 (emphasis added).

¶ 15 Here, there is similar uncontested evidence that respondent-father provided lunch, gifts, and clothing for the children and paid for Monica's birthday party in June 2019. But as in *In re D.C.*, this sporadic provision of gifts, food, and clothing does not preclude a finding by the trial court that respondent-father failed to provide a reasonable portion of the cost of care for the children when he made no payments to DSS or the foster parents during the relevant six-month period.

¶ 16 As noted above, "cost of care" under N.C.G.S. § 7B-1111(a)(3) contemplates the monetary cost of foster care that DSS is required to pay for the care of the children. *E.g.*, *In re Montgomery*, 311 N.C. 101, 113 (1984). Here, it is undisputed that the cost of care for each child during the determinative six-month period was in excess of $14,000. Unchallenged findings establish that respondent-father was employed

and earning about $250 per week while he was out of prison during the relevant six-month period, such that he could have provided some amount of support payments during this time. As in *In re D.C.*, the findings and evidence here "demonstrate that respondent[ ] had the ability to pay a reasonable portion of [the juveniles]' cost of care but failed to pay any amount to DSS or the foster parents toward cost of care." *In re D.C.*, ¶ 20. Respondent-father's failure to contribute any payments supports the trial court's challenged findings of fact. In turn, these findings support the trial court's conclusion that grounds existed under N.C.G.S. § 7B-1111(a)(3) to terminate respondent-father's parental rights.

¶ 17 Because a finding of a single statutory ground is sufficient to support termination of respondent-father's parental rights, we decline to address his arguments challenging the trial court's adjudication of other grounds under N.C.G.S. §§ 7B-1111(a)(1) and 7B-1111(a)(2). *In re E.H.P.*, 372 N.C. at 395. Respondent-father does not challenge the trial court's dispositional determination that it was in the best interests of Michael, Monica, and Maxine to terminate his parental rights. *See* N.C.G.S. § 7B-1110(a). Accordingly, the trial court's order is affirmed.

AFFIRMED.

IN THE MATTER OF M.R., A.R., M.R.

No. 195A21

Filed 15 July 2022

1. Termination of Parental Rights—grounds for termination—neglect—likelihood of future neglect—inability to provide care and safe environment

The trial court properly terminated a mother's parental rights to her three children on the ground of neglect where its unchallenged findings supported a determination that there was a likelihood of the repetition of neglect if the children were returned to the mother's care, based on her inability to provide stable housing or maintain utilities, her drug use, her criminal conduct leading to arrest and incarceration, and her delay of nearly twenty-one months after two of the children were taken into DSS custody before beginning to comply with her case plan.

2. Termination of Parental Rights—best interests of the child—statutory factors—adoptability—bond with mother versus prospective adoptive parents

The trial court did not abuse its discretion by concluding that terminating a mother's parental rights was in the best interests of her children, where the court's findings were supported by competent evidence, including a social worker's testimony regarding the children's adoptability and the likelihood of adoption by the children's foster parents, and demonstrated a proper consideration and reasoned weighing of the dispositional factors in N.C.G.S. § 7B-1110(a), including the relative bonds the children had with their mother and the foster parents.

3. Termination of Parental Rights—best interests of the child—adoptability—consent of children to being adopted

The trial court did not abuse its discretion by determining that the termination of a father's parental rights was in the best interests of his children. Although the father argued that the court did not sufficiently consider whether the children would consent to being adopted or whether they were ready to be adopted, the father's reliance on N.C.G.S. § 48-3-601, which provides that children over the age of twelve must consent to adoption, was misplaced because that statute governed adoptions and not termination of parental rights proceedings. Even if relevant, section 48-3-601 allows a trial court to dispense with the consent requirement upon a determination that it is not in the child's best interest to require consent.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) (2019) from order entered on 9 April 2021 by Judge Resson O. Faircloth in District Court, Harnett County. This matter was calendared in the Supreme Court on 1 July 2022 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Duncan B. McCormick for petitioner-appellee Harnett County Department of Social Services.

Mobley Law Office, P.A., by Marie H. Mobley, for appellee Guardian ad litem.

Peter Wood for respondent-appellant mother.

IN RE M.R.

[381 N.C. 838, 2022-NCSC-90]

David A. Perez for respondent-appellant father.

BERGER, Justice.

¶ 1 Respondent-parents appeal from an order terminating their parental rights to M.R. (Michael)[1], A.R. (Alice), and M.R. (Mary). For the reasons stated below, we affirm.

Factual and Procedural Background

¶ 2 Michael and Alice (the twins) were born in June 2009. On May 17, 2017, the Harnett County Department of Social Services (DSS) obtained nonsecure custody of the twins and filed petitions alleging they were neglected juveniles. The petitions alleged the following: respondent-mother had failed to appear for a court date and was in contempt of court for charges related to truancy; Alice was suffering from a yeast infection or urinary tract infection and respondent-mother failed to seek medical care; Alice had not been taken to a dentist although her teeth were rotting and aching; the twins were required to repeat kindergarten because they had missed forty-five days of school the prior year; respondent-mother did not have stable housing; and the twins reported sleeping on a sofa with men that respondent-mother invited into the home.

¶ 3 The petitions further alleged that despite periodically living with a family friend, respondent-mother and the twins were homeless. In addition, personal effects belonging to the twins and respondent-mother were dirty and kept in trash bags, and the twins' clothing was "so small that it hurt them" to wear. Moreover, the petition explained that Alice had been found unaccompanied at a bus stop, stating that she had not eaten dinner and was hungry. The twins were often late for school because respondent-mother was working late and leaving them with other caretakers. Eventually, respondent-mother voluntarily placed the twins with the maternal grandmother. In February 2017, DSS developed an In-Home Family Services Agreement with respondent-mother.

¶ 4 The petitions also alleged that on February 24, 2017, respondent-mother moved into a residence of her own. The twins were to remain in a temporary safety provider placement for two weeks while respondent-mother got settled into her home, but respondent-mother took them from the safety provider placement prematurely without notifying DSS. DSS home visits revealed multiple people in the home, and

1. Pseudonyms are used in this opinion to protect the juveniles' identity and for ease of reading.

Michael complained about "not being able to rest because of all the people." Respondent-mother could not maintain utilities in the home, and she was evicted on April 17, 2017. During this time, Alice complained "about her private area hurting," but respondent-mother failed to seek medical attention to address Alice's complaints.

¶ 5 On April 20, 2017, respondent-mother was arrested on outstanding warrants for obtaining a controlled substance, identity theft, and trafficking in opiates. Respondent-mother was also charged with possession of drug paraphernalia and possession with intent to manufacture, sell, and distribute heroin. She was released from custody on May 9, 2017, after using Alice's social security benefits to assist with her bond. Respondent-father had been incarcerated since the twins were a few months old and was scheduled to be released in August 2017.

¶ 6 On September 8, 2017, the trial court entered an order following a hearing adjudicating the twins neglected juveniles. The court ordered respondent-mother to complete a number of objectives related to her substance abuse, parenting skills, housing, and employment. The court ordered respondent-father to comply with the terms and conditions associated with life in the halfway house he was residing at and complete several directives related to housing, employment, and parenting skills. Respondent-parents were granted one hour of weekly supervised visitation.

¶ 7 On December 15, 2017, the trial court entered a permanency planning order finding respondent-mother: had missed scheduled visits with the twins in September and November of 2017; had not made progress on her case plan; had failed to complete a parenting course; had not obtained employment; did not cooperate with a substance abuse assessment or show for a scheduled drug screen in October 2017; and had tested positive for cocaine in December 2017.

¶ 8 Respondent-father had been released from prison in August 2017 but had not visited the twins consistently. He cooperated with a drug screen in December 2017, and tested negative, and reported that he had obtained housing in Fayetteville and employment at a construction company. The trial court set the primary permanent plan to guardianship, with concurrent secondary plans as custody with a relative or other suitable person and reunification with respondent-parents. The trial court also suspended respondent-mother's visitation until she could produce two consecutive negative drug screens.

¶ 9 On March 23, 2018, the trial court entered a permanency planning order finding that the twins had been placed with the paternal

great-grandmother since January 29, 2018. Respondent-mother failed to appear for a scheduled drug screen in February 2018 and again when it was rescheduled for March 2018. DSS reported observing respondent-father helping the twins with homework during a visitation, and the paternal great-grandmother reported that respondent-father assisted the twins before and after school.

¶ 10 Mary was born in May 2018, and on June 5, 2018, DSS obtained nonsecure custody after filing a juvenile petition alleging she was a neglected juvenile. The petition alleged that Mary had tested positive for cocaine, marijuana, and opiates at birth and was treated for withdrawal symptoms including tremors, feeding issues, and abnormal muscle tone. Respondent-mother admitted to taking Percocet daily and using cocaine and marijuana during her pregnancy. Following her discharge from the hospital on May 28, 2017, respondent-mother had only visited Mary twice before being arrested for multiple drug-related offenses. DSS also alleged that respondent-father had not made significant progress in complying with his family services agreement.

¶ 11 On July 13, 2018, the trial court entered a permanency planning order as to the twins, finding that the paternal great-grandmother had asked that they be removed from her home on June 8, 2018. The twins were subsequently placed in a licensed foster home. The trial court found that respondent-mother had failed to cooperate with drug screens, had not visited the twins since December 2017, and was incarcerated in the Harnett County jail for numerous drug-related charges from 2017 and 2018. Respondent-father had not contacted DSS to schedule visitation with the twins since they were removed from the paternal great-grandmother's home, and DSS had been unsuccessful in attempts to contact him to schedule drug screens. The trial court concluded that "reunification efforts with the parents clearly would be unsuccessful [and] should be ceased," and changed the primary permanent plan to adoption, with a secondary plan of guardianship.

¶ 12 On July 6, 2018, the trial court entered an order adjudicating Mary a neglected juvenile. Neither respondent had entered into family services agreements as to Mary. The trial court suspended respondent-mother's visitation with Mary until she could produce two consecutive negative drug screens. The court granted respondent-father one hour of weekly supervised visitation. The court ordered respondent-mother to enter into a family services agreement containing a host of directives related to her release from jail and cooperation with substance abuse and mental health treatments. Respondent-father was ordered to enter into a family services agreement containing directives related to obtaining and

maintaining stable housing, complying with drug screens, and completing parenting classes.

¶ 13 The trial court held a hearing regarding Mary on October 12, 2018 and entered a permanency planning order finding that respondent-mother was still incarcerated and had not had any negative drug screens or visits. Neither respondent had entered into out of home family services agreements regarding Mary. At the time of the hearing, respondent-father's whereabouts were unknown and he had not been in contact with DSS since DSS filed the juvenile petition on June 5, 2018. The trial court ceased respondents' visitations with Mary and set the primary permanent plan to adoption, with concurrent secondary permanent plans of guardianship and reunification.

¶ 14 On the same day, the trial court entered a permanency planning order as to the twins finding that respondent-mother had not made any progress since the June 29, 2018, hearing and failed to complete any of her case plan objectives. The trial court also determined that respondent-father had not participated in any services since the June 29, 2018, hearing and failed to complete any of his case plan objectives.

¶ 15 On October 16, 2018, DSS filed a motion to terminate respondents' parental rights to the twins pursuant to N.C.G.S. § 7B-1111(a)(1), (2), and (3). (2021). DSS further alleged that respondent-father had willfully abandoned the twins under N.C.G.S. § 7B-1111(a)(7) (2021).

¶ 16 On June 13, 2019, DSS filed a motion to terminate respondents' parental rights in Mary under N.C.G.S. § 7B-1111(a)(1) and (3). In addition, DSS alleged that respondent-father had not undertaken any actions required of him to legitimate Mary and had willfully abandoned her pursuant to N.C.G.S. § 7B-1111(a)(5) and (7).

¶ 17 Following hearings on August 16, 2019, the trial court entered permanency planning orders as to all the children finding that respondent-mother had pled guilty to multiple drug-related charges. Respondent-mother's active term of imprisonment had been suspended, and as a term of her probation, she was required to complete the Triangle Residence Options for Substance Abusers (TROSA) program.

¶ 18 Respondent-mother enrolled in TROSA in February 2019. She was compliant with the TROSA program, participating in parenting, anger management, and rational behavior classes, but would not be eligible for day visits with her children until she had completed eighteen months of the program. Respondent-father had not made or documented any progress since the October 2018 hearing.

¶ 19 Following four hearings held in November 2019 and January, February, and July 2020, the trial court entered an order on April 9, 2021, terminating respondents' parental rights to all three children. The court adjudicated the existence of grounds to terminate respondent-mother's parental rights in the twins under N.C.G.S. § 7B-1111(a)(1) and (2) and in Mary under N.C.G.S. § 7B-1111(a)(1). The court adjudicated the existence of grounds to terminate respondent-father's parental rights in the twins under N.C.G.S. § 7B-1111(a)(1), (2), (3), and (7) and in Mary under N.C.G.S. § 7B-1111(a)(1), (5), and (7). The court also concluded that it was in the children's best interests that respondents' parental rights be terminated. *See* N.C.G.S. § 7B-1110(a) (2021). Respondents timely filed notice of appeal.

Standard of Review

¶ 20 "We review a trial court's adjudication under N.C.G.S. § 7B-1111 'to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law.' " *In re E.H.P.*, 372 N.C. 388, 392, 831 S.E.2d 49, 52 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984)). This Court limits its review of the findings of fact to "only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58–59 (2019). "A trial court's finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding." *In re B.O.A.*, 372 N.C. 372, 379, 831 S.E.2d 305, 310 (2019). "Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. at 407, 831 S.E.2d at 58. We review the trial court's conclusions of law *de novo*. *In re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019).

¶ 21 "If [the trial court] determines that one or more grounds listed in section 7B-1111 are present, the court proceeds to the dispositional stage, at which the court must consider whether it is in the best interests of the juvenile to terminate parental rights." *In re D.L.W.*, 368 N.C. 835, 842, 788 S.E.2d 162, 167 (2016) (citing *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614–15 (1997); N.C.G.S. § 7B-1110 (2021)). A trial court's best interests determination "is reviewed solely for abuse of discretion." *In re A.U.D.*, 373 N.C. 3, 6, 832 S.E.2d 698, 700 (2019) (citing *In re D.L.W.*, 368 N.C. at 842, 788 S.E.2d at 167). "An abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re T.L.H.*, 368 N.C. 101, 107, 772 S.E.2d, 451, 455 (2015) (cleaned up).

¶ 22 In determining whether termination of parental rights is in the best interests of a juvenile:

> The court may consider any evidence, including hearsay evidence as defined in [N.C.]G.S. 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the best interests of the juvenile. In each case, the court shall consider the following criteria and make written findings regarding the following that are relevant:
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> (1) The age of the juvenile.
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> (2) The likelihood of adoption of the juvenile.
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> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
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> (4) The bond between the juvenile and the parent.
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> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

N.C.G.S. § 7B-1110(a) (2021).

Respondent-Mother's Appeal

¶ 23 **[1]** Respondent-mother challenges the trial court's adjudication of the existence of grounds to terminate her parental rights in the twins under N.C.G.S. § 7B-1111(a)(1) and (2) and in Mary under N.C.G.S. § 7B-1111(a)(1). She also contends the trial court abused its discretion in determining that it was in the twins' best interests that her parental rights be terminated.

¶ 24 A trial court may terminate parental rights if it concludes the parent has neglected the juvenile within the meaning of N.C.G.S. § 7B-101. N.C.G.S. § 7B-1111(a)(1). A neglected juvenile is defined, in pertinent part, as a juvenile "whose parent, guardian, custodian or caretaker . . . [d]oes not provide proper care, supervision, or discipline[;] . . . [or c]reates or allows to be created a living environment that is injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2021).

¶ 25 "[E]vidence of neglect by a parent prior to losing custody of a child—including an adjudication of such neglect—is admissible in subsequent

proceedings to terminate parental rights," but "[t]he trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984). The "determinative factors" in assessing the likelihood of a repetition of neglect are "the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*." *In re Z.G.J.*, 378 N.C. 500, 2021-NCSC-102, ¶ 26 (quoting *In re Ballard*, 311 N.C. at 715, 319 S.E.2d at 232).

¶ 26 Respondent-mother does not contest the fact that the children were previously adjudicated neglected. Instead, she challenges the trial court's conclusion that there was a likelihood of future neglect, specifically arguing that the court based this determination on her "behavior in the distant past" and failed to acknowledge her compliance with the case plan after entering TROSA in February 2019.[2] She also argues the trial court erred in concluding that grounds existed to terminate her parental rights under N.C.G.S. § 7B-1111(a)(1).[3]

¶ 27 Here, the trial court's conclusion that there was a likelihood of future neglect if the children were returned to respondent-mother's care is supported by its unchallenged findings of fact demonstrating respondent-mother's inability to provide proper care, supervision, discipline, and a living environment not injurious to their welfare at the time of the adjudication portion of the termination hearing. The court's unchallenged findings further show that the family's history with DSS began in 2015 when respondent-mother was unable to provide stable housing for herself or the twins, the twins were frequently late to school and picked up early from school, and the twins had to repeat kindergarten. DSS was involved with the family again in 2016 after respondent-mother and the twins were regularly homeless and the twins often showed up late for school wearing ill-fitting clothing.

¶ 28 Uncontested findings establish that in February 2017, respondent-mother developed an in-home family services agreement with DSS

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2. We note that the trial court labeled its determinations that respondent-mother neglected the children, and grounds exist to terminate respondent-mother's parental rights as findings of fact. These determinations are more properly classified as conclusions of law. *In re J.O.D.*, 374 N.C. 797, 807, 844 S.E.2d 570, 578 (2020). "[F]indings of fact [which] are essentially conclusions of law . . . will be treated as such on appeal." *State v. Sparks*, 362 N.C. 181, 185, 657 S.E.2d 655, 658 (2008) (alterations in original).

3. Respondent-mother also challenges findings of fact 156 and 162 and conclusion of law 6. Because they are not necessary to support the trial court's determination that grounds existed to terminate respondent-mother's parental rights under N.C.G.S. § 7B-1111(a)(1), we do not address these challenges.

but failed to meet its goals and objectives prior to the filing of the May 17, 2017, juvenile petitions. In 2017, respondent-mother had multiple people in her home, Michael complained about being unable to rest, and Alice complained about her "private area hurting her again." Respondent-mother was unable to maintain utilities in her home and was served with an eviction notice in April 2017. On April 20, 2017, she was arrested at the twins' school and charged with multiple drug-related offenses. The court awarded DSS nonsecure custody of the twins on May 17, 2017. Respondent-mother did not complete a parenting course, failed to appear for multiple drug screens, tested positive for cocaine in December 2017, and continued to use illegal drugs during her pregnancy with Mary. Respondent-mother did not obtain prenatal care for Mary, and Mary tested positive for cocaine, marijuana, and opiates at birth. On June 5, 2018, DSS obtained nonsecure custody of Mary.

¶ 29 The court also made unchallenged findings that respondent-mother was incarcerated from May 2018 to January 2019. In January 2019, she pleaded guilty to drug-related offenses and was sentenced to consecutive terms of eleven to twenty-three months and eight to nineteen months of imprisonment. Her sentence was suspended, she was placed on probation subject to a condition that she enroll in and complete TROSA, an "intensive, residential substance abuse treatment and behavior modification program." The court found that respondent-mother had made no progress between May 2017 and February 2019, when she enrolled in TROSA. While respondent-mother was compliant with the TROSA program, she was not scheduled to complete TROSA until February 2021 and would only be "eligible for day visits with her children after completing 12, 14, 16, and 18 months" and for "off-campus overnight visits after she has been in the program for 21 months."

¶ 30 Respondent-mother asserts that her compliance with the case plan after entering TROSA "only supported a finding that it was unlikely for the children to be neglected again." While we recognize the progress she made in complying with her case plan, "a parent's compliance with his or her case plan does not preclude a finding of neglect." *In re J.J.H.*, 376 N.C. 161, 185, 851 S.E.2d 336, 352 (2020) (citing *In re D.W.P.*, 373 N.C. 327, 339–40, 838 S.E.2d 396, 406 (2020)). As the trial court found, respondent-mother only began complying with her case plan in February 2019, nearly twenty-one months after the twins were taken into DSS custody. She continued to use illegal drugs through May 2018 and did not engage in substance abuse treatment or parenting classes until February 2019. At the time of the termination hearing, respondent-mother was not scheduled to complete the TROSA program until February 2021 and would not be eligible for off-campus, overnight visits until November 2020.

¶ 31 Respondent-mother lacked the ability to provide proper care, supervision, discipline, and a living environment not injurious to the children's welfare at the time of the termination hearing despite having ample opportunity and time to overcome the obstacles preventing her from doing so. Thus, the trial court did not err in determining that future neglect was likely if the children were returned to her care, and we affirm the trial court's determination that respondent-mother's parental rights in the children were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(1). We therefore need not reach respondent-mother's challenge to the trial court's conclusion that grounds existed to terminate her parental rights to the twins under N.C.G.S. § 7B-1111(a)(2). *In re M.A.*, 374 N.C. 865, 875, 844 S.E.2d 916, 924 (2020) ("[T]he existence of a single ground for termination suffices to support the termination of a parent's parental rights in a child.").

¶ 32 **[2]** Next, respondent-mother contends the trial court abused its discretion in determining it was in the twins' best interests that her parental rights be terminated. Respondent-mother first challenges dispositional findings 8, 10, and 15 as being unsupported by the evidence:

> 8. The juveniles are adoptable. Notwithstanding the likelihood that the adoption is high the foster parents want to adopt the juveniles after completing adoption proceedings on another child in their care.
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> . . .
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> 10. The foster parents of the twins are willing to adopt.
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> . . .
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> 15. Termination of parental rights will aid in the accomplishment of the primary permanent plan of adoption.

¶ 33 A review of the record, however, demonstrates that these challenged findings are supported by competent evidence. A DSS social worker testified that the twins had been placed in a pre-adoptive foster home since January 2018 and that the foster parents were willing to adopt the twins. The DSS social worker further testified that the twins were adoptable, adoption was likely, and termination of parental rights would clear a "major barrier" in accomplishing the primary plan of adoption. Accordingly, we reject respondent-mother's challenges to these dispositional findings of fact.

¶ 34 Next, respondent-mother contends that the trial court erred in concluding that termination was in the twins' best interests when three factors weighed against termination: the bond between the twins and respondent-mother, including the twins' wishes to stay with her; the likelihood of adoption of the twins; and respondent-mother's continued success in complying with her case plan.[4]

¶ 35 We emphasize that it is within the trial court's discretion "to weigh the various competing factors in N.C.G.S. § 7B-1110(a) in arriving at its determination of the child's best interests." *In re N.C.E.*, 379 N.C. 283, 2021-NCSC-141, ¶ 30. "[T]he bond between parent and child is just one of the factors to be considered under N.C.G.S. § 7B-1110(a), and the trial court is permitted to give greater weight to other factors." *In re Z.L.W.*, 372 N.C. at 437, 831 S.E.2d at 66. In addition, "while the trial court is entitled to consider the children's wishes in determining whether termination of their parents' parental rights would be appropriate, their preferences are not controlling given that the children's best interests constitute 'the polar star' of the North Carolina Juvenile Code." *In re M.A.*, 374 N.C. 865, 879, 844 S.E.2d 916, 926–27 (2020) (quoting *In re T.H.T.*, 362 N.C. 446, 450, 665 S.E.2d 54, 57 (2008)).

¶ 36 Here, the trial court's findings demonstrate that it considered the dispositional factors set forth in N.C.G.S. section 7B-1110(a) and "performed a reasoned analysis weighing those factors." *In re Z.A.M.*, 374 N.C. 88, 101, 839 S.E.2d 792, 801 (2020). The trial court found that the twins were eleven years old and that they were adoptable. The likelihood of adoption was high, and their foster parents wanted to adopt the twins after completing adoption proceedings on another child that was in their care. While the trial court found that the twins had a bond with respondent-mother, they had a "strong parent-child bond" with their foster parents as well, referring to them as "mom and dad." The trial court also made findings detailing their consideration of respondent-mother's compliance with the TROSA program.

¶ 37 Here, the trial court made sufficient dispositional findings and performed a reasoned analysis of the relevant factors. The trial court's decision is not "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re T.L.H.*, 368 N.C. 101, 107, 772 S.E.2d, 451, 454 (2015). Thus, the trial court did

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4. Specifically, respondent-mother challenges dispositional finding of fact 53 and conclusion of law 2 which both provide as follows: "It is in the best interests of the twins to terminate the parental rights of the parents." Although the trial court labeled this determination a finding of fact, it is a conclusion of law, and we review it accordingly. *See Sparks*, 362 N.C. at 185, 657 S.E.2d at 658.

not abuse its discretion in concluding it was in the twins' best interests to terminate respondent-mother's parental rights. The trial court's order terminating respondent-mother's parental rights in the children is affirmed.

Respondent-Father's Appeal

¶ 38 **[3]** Respondent-father's sole argument on appeal is that the trial court abused its discretion in determining it was in the twins' best interests to terminate his parental rights. While acknowledging that the trial court made extensive dispositional findings, "addressing far more than just the five factors specified in [N.C.G.S.] § 7B-1110(a)," he argues that the trial court did not properly consider the issue of whether the twins would consent to their own adoptions and that the twins were not in a position to be immediately adoptable. He contends that the trial court "improperly weighed the evidence" to such a degree that its decision amounted to an abuse of discretion.[5]

¶ 39 As respondent-father points out, N.C.G.S. § 48-3-601 (2021) provides that a juvenile over the age of twelve must consent to an adoption. While we note that the twins were eleven years old at the time of the termination hearing, N.C.G.S. § 48-3-601 governs adoption, rather than termination of parental rights proceedings. Also, N.C.G.S. § 48-3-603(b) provides that a trial judge may dispense with the requirement that a child who is twelve years of age or older consent to an adoption "upon a finding that it is not in the best interest of the minor to require the consent." N.C.G.S. § 48-3-603(b)(2) (2021). Hence, any refusal on the part of the twins to consent to a proposed adoption would not preclude their adoption. Even assuming that the twins were not in a position to be immediately adoptable, "the absence of an adoptive placement for a juvenile at the time of the termination hearing is not a bar to terminating parental rights." *In re A.J.T.*, 374 N.C. 504, 512, 843 S.E.2d 192, 197. Thus, respondent-father's arguments are unavailing. The order of the trial court is affirmed.

AFFIRMED.

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5. Like respondent-mother, respondent-father challenges dispositional finding of fact 53 and conclusion of law 2 which determine that it is in the twins' best interests to terminate his parental rights. As stated above, although the trial court labeled this determination as a finding of fact, it is more properly classified as a conclusion of law, and we review it as such.

IN RE N.W.

[381 N.C. 851, 2022-NCSC-91]

IN THE MATTER OF N.W., J.W., L.W.

No. 348A21

Filed 15 July 2022

Termination of Parental Rights—grounds for termination—willful abandonment—attempts to regain contact with children

In a case involving ex-spouses who previously lived in Kentucky, the trial court properly dismissed the mother's petition to terminate the father's parental rights in their three children on the ground of willful abandonment. The court's factual findings showed that, during the determinative six-month period, the father paid child support and attempted to register in North Carolina the parties' Kentucky custody order (granting sole custody to the mother while entitling the father to seek review of the order and request visitation upon completing the Friend of the Court's recommendations). Further, the court found that the father—who had been prevented from contacting the children under protective orders entered in Kentucky—had made several efforts to regain contact with his children outside of the determinative six-month period, including complying with the Friend of the Court's recommendations, making multiple attempts to obtain relief from the protective orders, and relocating to North Carolina to be closer to where the mother had moved with the children.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) (2019) from an order entered on 26 May 2021 by Judge William B. Davis in District Court, Guilford County. This matter was calendared in the Supreme Court on 1 July 2022, but was determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Tharrington Smith, LLP, by Jeffrey R. Russell and Evan B. Horwitz, for petitioner-appellant mother.

Garron T. Michael, for respondent-appellee father.

ERVIN, Justice.

¶ 1 Petitioner-mother Kelly N., the mother of N.W., J.W., and L.W., appeals from a trial court order dismissing her petition seeking to have the

parental rights of respondent-father Josey W., the children's father, terminated. After careful consideration of petitioner-mother's challenges to the trial court's dismissal order in light of the record and the applicable law, we conclude that the trial court's order should be affirmed.

I. Background

¶ 2 Petitioner-mother and respondent-father were married in October 2006 and separated in May 2015. All three of the children at issue in this case were born during the marriage.

¶ 3 On 8 April 2016, petitioner-mother applied for an Order of Protection in Kentucky on the grounds that respondent-father had committed acts of physical abuse against her in the past and was currently making threats against her and obtained the entry of an Emergency Protective Order that awarded temporary custody of the children to petitioner-mother and prohibited respondent-father from contacting petitioner-mother and the children. After a hearing held on 21 April 2016, the Kentucky court entered a Domestic Violence Order against respondent-father that prohibited him from committing further acts of abuse and ordered him to refrain from contacting petitioner-mother and the children for a period of one year. Although respondent-father sought appellate review of the protective order, the Kentucky Court of Appeals upheld it on appeal.

¶ 4 While respondent-father's appeal was pending, the parties agreed to the entry of an order in June 2016 modifying the protective order so as to allow respondent-father to have supervised visitation with the children at Sunflower Kids, Inc., a Kentucky childcare center. Subsequently, respondent-father visited with the children between June and October 2016, with these visits having ended as a result of the fact that respondent-father canceled three of them given his out-of-state work obligations. Although respondent-father filed a motion seeking to have the protective order amended so that he could have telephonic contact with the children while he was out of town, petitioner-mother opposed the proposed modification and it was never approved. As a result, respondent-father has not had any further contact with the children since that time.

¶ 5 In November 2016, the parents agreed to the entry of an order allowing the Kentucky court to appoint "The Office of the Friend of the Court" to provide them with assistance in addressing their disputes concerning custody of and visitation with the children. In light of that agreement, the Kentucky court appointed a Friend of the Court in December 2016 with instructions to conduct a timesharing risk assessment and make recommendations consistent with the best interests of the children. In

March 2017, petitioner-mother sought and obtained an extension of the protective order from the Kentucky court until October 2020.

¶ 6 In November 2017, the parents agreed to a custody arrangement as part of a Property Settlement Agreement, which was, in turn, incorporated into a decree dissolving their marriage that was entered on 8 December 2017. In accordance with this agreement and the resulting custody order, petitioner-mother was awarded sole custody of the children, with respondent-father being allowed to seek review of the custody arrangement within one year after the entry of the custody order upon his successful completion and implementation of the recommendations made by the Friend of the Court and to request the right to visit with and have contact with the children ninety days after his receipt of the Friend of the Court's recommendations. In addition, respondent-father was ordered to continue making monthly child support payments of $1,500 to petitioner-mother by means of a wage assignment process.

¶ 7 In February 2018, respondent-father's father filed a motion seeking grandparent visitation with the children, with respondent-father having submitted an affidavit in support of this request. Petitioner-mother opposed the paternal grandfather's motion and sought to have it dismissed. After giving notice to the Kentucky court of her intent to relocate in July 2018 petitioner-mother moved to North Carolina with the children in August 2018.

¶ 8 In September 2018, respondent-father filed a motion seeking to be allowed to have supervised visitation with the children with the Kentucky court. Petitioner-mother opposed respondent-father's motion and sought to have it dismissed. In reply to petitioner-mother's dismissal motion, respondent-father stated that he did not know petitioner-mother's new address and requested to be provided with that information so that "he c[ould] pursue timeshare in the new jurisdiction." On 31 October 2018 and 16 November 2018, respectively, the Kentucky court declined to exercise jurisdiction over the paternal grandfather's visitation motion and respondent-father's motion for supervised visitation and dismissed those motions on the grounds that neither the parents nor the children resided in Kentucky at that time.

¶ 9 On 25 February 2020, respondent-father filed a petition seeking to have the Kentucky child custody order registered in Guilford County. On 20 March 2020, petitioner-mother filed a petition seeking to have respondent-father's parental rights in the children terminated. On 7 May 2020, respondent-father filed an answer in which he denied the material allegations contained in the termination petition and moved to dismiss

it based upon an alleged jurisdictional defect and the petition's alleged failure to state a claim for which relief could be granted.

¶ 10 On 14 May 2020, petitioner-mother filed a motion seeking leave to amend her termination petition for the purpose of curing the alleged jurisdictional defect. On 15 September 2020, the trial court entered an order granting petitioner-mother's amendment motion and appointing a guardian ad litem for the children.

¶ 11 On 18 September 2020, petitioner-mother filed an amended termination petition in which she alleged that respondent-father's parental rights in the children were subject to termination on the basis of willful abandonment pursuant to N.C.G.S. § 7B-1111(a)(7) on the grounds that, since October 2016, respondent-father had not had any contact with the children, had failed to maintain a bond with the children, and had failed to send anything to the children or acknowledge their birthdays; that respondent-father had failed to comply with the Friend of the Court's recommendation that he seek modification of the custody agreement; that respondent-father had not contacted or seen the children since they had relocated to North Carolina; and that respondent-father "ha[d] withheld his love and affection from the juveniles and ha[d] intentionally foregone all parental duties and responsibilities with regard to the juveniles (with the exception of child support, which is paid via wage withholding)" and on the grounds that the termination of his parental rights would be in the children's best interests. In a response to the amended petition filed on 6 October 2020, respondent-father asserted that his failure to communicate or see the children had resulted from compliance with lawful orders of the Kentucky court and that he had paid support for the children each month since 2016.

¶ 12 The issues raised by respondent-mother's termination petition came on for hearing before the trial court on 11 May 2021. On 26 May 2021, the trial court entered an order dismissing the termination petition at the conclusion of petitioner-mother's evidence based upon a determination that petitioner-mother had failed to establish that respondent-father had willfully abandoned the children. Petitioner-mother noted an appeal to this Court from the trial court's dismissal order.

II. Analysis

¶ 13 In seeking relief from the dismissal order before this Court, petitioner-mother argues that the trial court erred by determining that respondent-father's parental rights in the children were not subject to termination on the basis of willful abandonment pursuant to N.C.G.S. § 7B-1111(a)(7). "Our Juvenile Code provides for a two-step process for

termination of parental rights proceedings consisting of an adjudicatory stage and a dispositional stage." *In re Z.A.M.*, 374 N.C. 88, 94 (2020). At the adjudicatory stage, the trial court must "take evidence, find the facts, and [ ] adjudicate the existence or nonexistence of any of the circumstances set forth in [N.C.]G.S. [§] 7B-1111 which authorize the termination of parental rights of the respondent." N.C.G.S. § 7B-1109(e) (2021). "The burden in such proceedings [is] upon the petitioner . . . and all findings of fact shall be based on clear, cogent, and convincing evidence." N.C.G.S. § 7B-1109(f) (2021). "Should the court determine that circumstances authorizing termination of parental rights do not exist, [it] shall dismiss the petition . . . , making appropriate findings of fact and conclusions." N.C.G.S. § 7B-1110(c) (2021).

¶ 14 We review orders entered by the trial court in termination proceedings "to determine whether the findings are supported by clear, cogent and convincing evidence and [whether] the findings support the conclusions of law." *In re E.H.P.*, 372 N.C. 388, 392 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111 (1984)). "A trial court's finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding." *In re B.O.A.*, 372 N.C. 372, 379 (2019) (citing *In re Moore*, 306 N.C. 394, 403–04 (1982)). "Unchallenged findings are deemed to be supported by the evidence and are binding on appeal." *In re R.G.L.*, 379 N.C. 452, 2021-NCSC-155, ¶ 12. "The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 373 N.C. 16, 19 (2019).

¶ 15 A parent's parental rights in a child are subject to termination pursuant to N.C.G.S. § 7B-1111(a)(7) in the event that the petitioner proves that "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion[.]" N.C.G.S. § 7B-1111(a)(7) (2021). Abandonment for purposes of N.C.G.S. § 7B-1111(a)(7) "implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re N.D.A.*, 373 N.C. 71, 77 (2019) (quoting *In re Young*, 346 N.C. 244, 251 (1997)). "The willfulness of a parent's actions is a question of fact for the trial court," with " '[i]ntent' and 'wilfullness' [being] mental emotions and attitudes [that are] seldom capable of direct proof" and that "must ordinarily be proven by circumstances from which they may be inferred[.]" *In re K.N.K.*, 374 N.C. 50, 53 (2020) (cleaned up). "[A]lthough the trial court may consider a parent's conduct outside the six-month window in evaluating a parent's credibility and intentions, the 'determinative' period for adjudicating willful abandonment is the six consecutive months preceding the filing

of the petition." *In re N.D.A.*, 373 N.C. at 77 (quoting *In re D.E.M.*, 257 N.C. App. 618, 619 (2018)). As the trial court found in the dismissal order, petitioner-mother filed her petition seeking to have respondent-father's parental rights in the children terminated on 20 March 2020, so that the determinative six-month period for purposes of this case ran from 20 September 2019 through 20 March 2020.

¶ 16 According to the trial court's findings of fact, respondent-father "paid current support of $1,500.00 a month to [p]etitioner[-mother] through wage withholding." In addition, the trial court found that respondent-father had filed a petition seeking to have the Kentucky custody order registered in North Carolina pursuant to N.C.G.S. § 50A-305(a) on 25 February 2020. Finally, the trial court made numerous findings concerning events that had occurred outside the determinative period, including detailed information relating to the proceedings in which petitioner-mother and respondent-father had been involved in Kentucky, the entry of the Kentucky orders that prohibited respondent-father from contacting petitioner-mother and the children, and respondent-father's compliance with the Friend of the Court's recommendations and attempts to obtain relief from the Kentucky court orders so that he could have contact with the children. *See In re N.D.A.*, 373 N.C. at 77 (stating that "the trial court may consider a parent's conduct outside the six-month window in evaluating a parent's credibility and intentions"). Based upon these findings, the trial court stated in Finding of Fact No. 32 that "[r]espondent[-father] has not willfully abandoned the juveniles and that [r]espondent[-father]'s acts and actions during the six[-]month period prior to the filing of the [p]etition indicate an intent to support the juveniles and seek contact and reunification with the juveniles" before determining in Conclusion of Law No. 3 that "[r]espondent[-father] ha[d] not willfully abandoned the juveniles[.]"

¶ 17 In her initial challenge to the trial court's dismissal order, petitioner-mother argues that the trial court erred in the course of making several findings of fact concerning events that occurred outside the determinative six-month period. First, petitioner-mother contends that the trial court erred by stating in Finding of Fact No. 8 that "[r]espondent [-father] visited regularly with the juveniles at Sunflower Kids"; that he "cancelled three consecutive visits due to having employment outside of the State"; and that "[t]he [c]ourt finds no clear, cogent and convincing evidence as to why the visitation ceased thereafter at Sunflower Kids." In arguing that the trial court had erroneously failed to determine why respondent-father's visits with the children had ended, petitioner-mother asserts that there was "conflicting evidence as to this point" and that the

trial court "needed to assess the credibility of the witnesses and resolve the conflict by finding what happened." We do not find this argument to be persuasive.

¶ 18 Although the trial court does have responsibility for evaluating the credibility of the witnesses, weighing the evidence, and determining the relevant facts, *In re R.D.*, 376 N.C. 244, 258 (2020); *see also* N.C.G.S. § 7B-1109(e), its findings of fact must be based upon clear, cogent, and convincing evidence, N.C.G.S. § 7B-1109(f). At the time that it announced its decision to dismiss petitioner-mother's termination petition, the trial court stated in open court that:

> The evidence about under what circumstances no further visits were scheduled thereafter is the area where there's sort of some mixed evidence and the court finds that there's not sufficient evidence to make a finding by clear, cogent, and convincing evidence to the court's satisfaction of how that came to pass so I'm not ascribing that.

In addition, the trial court stated in Finding of Fact No. 8 that the record contained "no clear, cogent and convincing evidence as to why the visitation ceased." In view of the fact that this Court is not entitled to reweigh the evidence and to make its own findings of fact, *In re R.D.*, 376 N.C. at 258, and the fact that the trial court's findings must rest upon clear, cogent, and convincing evidence, we cannot fault the trial court for failing to make a particular finding of fact based upon evidence that it determined was not clear, cogent, and convincing, since it would have been error for the trial court to have made such a finding, *see* N.C.G.S. § 7B-1109(f).

¶ 19 In addition, petitioner-mother argues that the trial court erred in making Finding of Fact No. 8 because "it does not give a date or a timeframe when the events occurred" and that, in light "of the determinative six-month period, it is important for the trial court to clearly delineate evidence that takes place within and without this period." Although Finding of Fact No. 8 does not specify the times at which the visits in question occurred, the relevant information can be gleaned from an examination of the trial court's other findings of fact. For example, in Finding of Fact No. 7, the trial court found that respondent-father had been allowed to have supervised contact with the children at Sunflower Kids pursuant to an order modifying the protective order that was entered on 6 June 2016 and that the amended protective order was set to expire on 21 April 2017. As a result of the fact that respondent-father's

visits with the children took place in Kentucky pursuant to an order that was to expire in April 2017 and the fact that the trial court stated in unchallenged Finding of Fact No. 23 that petitioner-mother had relocated to North Carolina with the children in August 2018, it is clear that respondent-father's visits with the children did not occur during the determinative six-month period. As a result, we conclude that petitioner-mother's challenges to Finding of Fact No. 8 lack merit.

¶ 20 Next, petitioner-mother argues that the trial court erred by making Finding of Fact Nos. 17 and 21, which discuss the recommendations that the Friend of the Court made and the nature and extent of respondent-father's compliance with those recommendations. Finding of Fact No. 17 states that

> [n]o written report, instructions or recommendations were filed with the Court or provided to the parties by the Friend of the Court. No Court order was filed indicating the steps [r]espondent[-father] needed to take to request contact with the juveniles. The Court finds that the parties were notified verbally of the recommendations; and [p]etitioner[-mother] and [r]espondent[-father] acknowledge being aware of the recommendations.

According to petitioner-mother, the trial court's statement that "[n]o written report, instructions or recommendations were filed with the Court or provided to the parties by the Friend of the Court" lacks clarity given that it fails to specify the identity of the "court" to which the finding refers and that the relevant finding is, "[a]t best," "misleading" given that it uses "the words 'filed' instead of 'provided' and 'parties' instead of 'counsel for both parties,' " since the relevant Kentucky order provided that the Friend of the Court "shall provide counsel for both parties and the Court a copy of her report." In view of the fact that the clear implication of Finding of Fact No. 17 is that the parents were aware of the nature and extent of the Friend of the Court's recommendations and the fact that their knowledge of these recommendations is undisputed, we are unable to see how the alleged lack of clarity in Finding of Fact No. 17 adversely affected petitioner-mother's chances for a more favorable outcome at the termination hearing. *See In re T.N.H.*, 372 N.C. 403, 407 (2019) (explaining that we only review those findings necessary to support the trial court's determination whether grounds exist to terminate parental rights). As a result, the trial court did not commit prejudicial error in making Finding of Fact No. 18.

¶ 21 In addition, petitioner-mother argues that the trial court erred in making Finding of Fact No. 21, which states that "[r]espondent[-father] completed these recommendations of the Friend of the Court with the goal of reestablishing contact with the juveniles and that his timing in doing so was not to the satisfaction of [p]etitioner[-mother]." According to petitioner-mother, this "finding is problematic because it does not give a date or a timeframe when the events occurred[,]" with it being "important for the trial court to clearly delineate evidence that takes place within and without [the determinative six-month] period." In addition, petitioner-mother contends that the trial court failed to explain how respondent-father's compliance with the Friend of the Court's recommendations "was done with the goal or intent of reestablishing contact with the juveniles." Once again, we are not persuaded by petitioner-mother's arguments.

¶ 22 In Finding of Fact Nos. 18 through 20, which petitioner-mother has not challenged as lacking in sufficient evidentiary support, the trial court found that, in light of the Friend of the Court's recommendations, respondent-father had submitted to random drug screens from May to July 2016; completed a forty-four hour partner abuse intervention program in July 2018; and obtained a mental health assessment in November 2017. The reference to "these recommendations" in Finding of Fact No. 21 clearly relates to the information set out in Finding of Fact Nos. 18 through 20, each of which specifies the point in time at which respondent-father complied with the relevant recommendation. In addition, it is clear from Finding of Fact No. 16, which petitioner-mother has not challenged as lacking in sufficient evidentiary support, that respondent-father's successful compliance with the Friend of the Court's recommendations was required before he was entitled to seek review of the Kentucky custody order and to resume having contact with the children. Finally, respondent-father testified that he had complied with the Friend of the Court's recommendation in order to have the ability to see his children. As a result, the trial court did not err in the course of making Finding of Fact No. 21.

¶ 23 Similarly, petitioner-mother contends that the trial court erred in making Finding of Fact No. 22, which states that respondent-father had paid support in the amount of $1,500 each month to petitioner-mother by means of the wage withholding process "at all times since" the Kentucky custody order was entered in December 2017. A careful review of petitioner-mother's brief establishes that there is no dispute that respondent-father paid support during the determinative six-month period, with the uncontested evidence tending to show that

respondent-father made every required support payment from 2019 through 2021. Even so, petitioner-mother contends that the trial court's finding that respondent-father had made all required support payments since December 2017 is not supported by the record evidence in light of the fact that respondent-father's support payments had been made through a wage withholding process because of previously difficulty in making the required payments and the fact that respondent-father had been held in contempt for failing to pay child support and non-compliance with other court orders. Given that the evidence upon which petitioner-mother relies in making this argument does not specify when respondent-father had difficulty paying child support, when respondent-father was found in contempt, or whether respondent-father had been held in contempt for failure to pay child support, the record does not establish that these portions of Finding of Fact No. 22 were made in error. On the other hand, petitioner-mother is correct in pointing out that the record contains no evidence addressing the extent to which respondent-father paid child support in 2018. For that reason, we will disregard Finding of Fact No. 22 in determining whether the trial court's findings support its conclusion that respondent-father's parental rights in the children were not subject to termination on the basis of abandonment pursuant to N.C.G.S. § 7B-1111(a)(7) to the extent that it finds that respondent-father had paid child support in 2018. *See In re L.H.*, 378 N.C. 625, 2021-NCSC-110, ¶ 14 (disregarding factual findings not supported by the record).

¶ 24 After addressing and resolving petitioner-mother's challenges to the trial court's findings of fact, we must now address her argument that the trial court erred in Finding of Fact No. 32 and Conclusion of Law No. 3 by determining that respondent-father did not willfully abandon the children for purposes of N.C.G.S. § 7B-1111(a)(7). According to petitioner-mother, the trial court erred in making this determination because Finding of Fact No. 32 "fails to delineate the determinative six-month period or specifically find the 'acts and actions' [respondent-father] supposedly engaged in." We hold that petitioner-mother's contention to this effect lacks merit.

¶ 25 In support of this particular argument, petitioner-mother evaluates Finding of Fact No. 32 without considering the remainder of the trial court's dismissal order. The trial court determined in Finding of Fact No. 31 that petitioner-mother had filed the termination petition on 20 March 2020 and stated in Finding of Fact No. 32 that it was considering "the six[-]month period prior to the filing of the [p]etition[.]" Although the trial court did not precisely identify the beginning and ending of the

determinative six-month period in Finding of Fact No 32, it is evident that the trial court considered the proper timeframe in deciding that respondent-father's parental rights in the children were not subject to termination on the basis of abandonment.

¶ 26 In addition, the trial court's findings clearly reflect that, during the determinative six-month period, respondent-father had paid child support and sought to have the Kentucky custody order registered in North Carolina, with petitioner-mother having failed to contend that the record did not support the trial court's finding that respondent-father engaged in these activities during the determinative six-month period. Instead, petitioner-mother argues that "th[o]se acts or actions are insufficient" to preclude a determination that respondent-father had not willfully abandoned the children, discounting respondent-father's attempt to register the Kentucky custody order in North Carolina on the grounds that respondent-father had failed to seek the right to visit with the children or to have the visitation provisions contained in the Kentucky custody order modified as part of his attempt to have the custody order registered in North Carolina and discounting respondent-father's payment of child support on the grounds that, since it resulted from wage withholding, those payments were not made voluntarily.

¶ 27 Although the making of child support payments as the result of a wage withholding process and the making of an attempt to register a foreign custody order in a particular state are not, standing alone, definitive indicators of a parent's intent to remain a part of a child's life, the trial court also found that respondent-father had the "intent to support the juveniles and seek contact and reunification with the juveniles." The trial court's finding to this effect is supported by both respondent-father's testimony and the trial court's findings concerning events that occurred outside the determinative sixth-month period that show respondent-father's considerable, albeit unsuccessful, attempts to reestablish contact with the children and to become involved in their lives.

¶ 28 Among other things, respondent-father testified that he did not abandon his children; that his lack of contact with his them was not willful because such contact had been precluded by the Kentucky court orders; that he had done everything that he had been required to do in order to have contact with his children, including paying child support; and that he believed that he was required to register the Kentucky custody order in North Carolina as a precondition for seeking to have it modified. In addition, the trial court's findings show that respondent-father had been prohibited from contacting petitioner-mother and the children from April 2016 through the date of the filing of the termination petition

and that he had been found in contempt and incarcerated as the result of violations of the protective orders that the trial court found to have stemmed from his efforts to have contact with the children. Similarly, the trial court's findings establish that respondent-father had complied with the recommendations of the Friend of the Court in an attempt to re-establish contact with the children and that he had made various filings in Kentucky between April 2016 and November 2018 as part of an unsuccessful effort to obtain the ability to have contact with the children. As part of his last effort to obtain supervised visitation in Kentucky, the trial court found that respondent-father had asked to be provided with petitioner-mother's new address so that he could "pursue a timeshare in the new jurisdiction." Finally, the trial court's unchallenged findings of fact address respondent-father's continued attempts to be involved with the children after the filing of the termination petition, including his decision to relocate to North Carolina in November 2020 and his actions in contacting petitioner-mother for the purpose of inquiring about and seeking to have contact with the children after petitioner-mother unsuccessfully attempted to have the protective order renewed in North Carolina in December 2020.

¶ 29 After carefully reviewing the record, we hold that this evidence and these findings of fact support the trial court's finding that "[r]espondent[-father]'s acts and actions during the six[-]month period prior to the filing of the [p]etition indicate an intent to support the juveniles and seek contact and reunification with the juveniles" and its determination in Finding of Fact No. 32 and its conclusion in Conclusion of Law No. 3 that "[r]espondent[-father] has not willfully abandoned the juveniles[.]" In view of the fact that the only ground for termination alleged in petitioner-mother's termination petition was willful abandonment pursuant to N.C.G.S. § 7B-1111(a)(7) and the fact that the trial court did not err in determining that respondent-father had not willfully abandoned the children, we further hold that the trial court did not err by dismissing petitioner-mother's termination petition. As a result, the trial court's dismissal order is affirmed.

AFFIRMED.

IN RE R.L.R.

[381 N.C. 863, 2022-NCSC-92]

IN THE MATTER OF R.L.R.

No. 305A21

Filed 15 July 2022

1. Termination of Parental Rights—grounds for termination—neglect—likelihood of future neglect—inadequate progress on case plan

The trial court's order terminating respondent-mother's parental rights in her daughter on the ground of neglect was affirmed where clear, cogent, and convincing evidence supported the court's factual findings, including that respondent-mother did not begin working on her social services case plan until shortly before the termination hearing; she failed to demonstrate the sustained behavioral changes necessary to ensure her child's safety and welfare, particularly where it came to her substance abuse and parenting-related issues; her visits with the child were discontinued because of her inconsistent attendance and the resulting negative effect on the child; and she failed to maintain suitable housing and stable employment. In turn, these findings supported the court's conclusion that there was a high likelihood of future neglect if the child were returned to respondent-mother's care.

2. Termination of Parental Rights—best interests of the child—consideration of statutory factors—additional factors not listed in statute

The trial court did not abuse its discretion by concluding that terminating respondent-mother's parental rights in her daughter was in the child's best interests, where the court's factual findings were supported by the evidence and adequately addressed each dispositional factor in N.C.G.S. § 7B-1110(a), including that there was no bond between the child and respondent-mother (at best, the record showed that any bond between them had lessened significantly), and that the likelihood of adoption was high where the child was a "very loving little girl" who did not exhibit any behavioral issues and where social services had already identified two potential adoptive families. Further, respondent-mother's argument that trial courts should consider additional dispositional factors not listed in section 7B-1110(a) should have been directed to the legislature, and, at any rate, the catch-all provision in section 7B-1110(a)(6) allows courts to consider "any relevant consideration" not enumerated in the statute.

IN RE R.L.R.

[381 N.C. 863, 2022-NCSC-92]

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) (2019) from an order entered on 28 May 2021 by Judge D. Brent Cloninger in District Court, Cabarrus County. This matter was calendared for argument in the Supreme Court on 1 July 2022, but was determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

William L. Esser, IV, for Guardian ad Litem, and E. Garrison White for petitioner-appellee Cabarrus County Department of Human Services.

Christopher M. Watford for respondent-appellant mother.

ERVIN, Justice.

¶ 1 Respondent-mother Kayla H. appeals from an order entered by the trial court terminating her parental rights in her daughter, R.L.R.[1] After careful consideration of respondent-mother's challenges to the trial court's termination order in light of the record and the applicable law, we conclude that the trial court's order should be affirmed.[2]

I. Background

¶ 2 On 2 April 2019, the Cabarrus County Department of Human Services filed a verified juvenile petition alleging that Rachel was a neglected and dependent juvenile and obtained the entry of an order placing her in nonsecure custody. In its petition, DHS described its interactions with Rachel's family following the receipt of a child protective services report on 26 November 2018 concerning a "nasty black, blue and red bruise on the left side of [Rachel's] face covering her lip, neck, jaw, and face[.]" Although the initial report indicated that Rachel had sustained this bruise as the result of a fall that had occurred while she was in her stepfather's care, Rachel stated during an appointment at the Child Advocacy Center that "her daddy pushed her[,]" an assertion that caused the Child Advocacy Center staff to reach the conclusion that Rachel's "injuries were from non-accidental trauma" and to become concerned

1. R.L.R. will be referred to throughout the remainder of this opinion as "Rachel," which is a pseudonym used to protect the identity of the juvenile and for ease of reading.

2. Although the trial court terminated the parental rights of Rachel's father, Ricky R., as well, the father did not note an appeal to this Court from the trial court's termination order. As a result, we will refrain from discussing the facts relating to the father's situation in any detail in this opinion.

about the possibility that Rachel had been subjected to physical abuse. After the maternal grandmother had been identified as a temporary safety provider, Rachel was placed in the maternal grandmother's care pursuant to a safety agreement stating that respondent-mother could only have supervised contact with Rachel and that the stepfather could not have any contact with Rachel at all.

¶ 3 DHS also alleged that the stepfather had been charged with committing felony and misdemeanor drug offenses on 16 December 2018 and that respondent-mother had reported on 17 December 2018 that she had used cocaine and marijuana while Rachel had been temporarily placed with the maternal grandmother. DHS asserted that, on 19 December 2019, "[t]he case was substantiated for physical abuse and neglect due to concerns of improper supervision, substance abuse, and injurious environment" and transferred it to the in-home services unit. Although respondent-mother missed an initial child and family team meeting that was held on 14 January 2019, she attended a rescheduled meeting that was held on 25 January 2019, at which time she agreed to a case plan that required her to participate in parenting education and demonstrate the skills that she had learned in disciplining, supervising, and protecting Rachel; complete a substance abuse assessment and comply with any resulting recommendations; submit to random drug screening within two hours after having been requested to do so; and sign releases authorizing the provision of information to DHS.

¶ 4 DHS further alleged that, while the family was receiving in-home services, the agency had received a second child protective services report on 29 January 2019 indicating that Rachel had been in the care of respondent-mother rather than the maternal grandmother and that the respondent-mother was taking Rachel to the stepfather's home. DHS asserted that it had received a third child protective services report on 14 March 2019 indicating that there were drugs in the family home and that respondent-mother and the stepfather had "fallen asleep (passed out) due to possible heroin use" while Rachel was in the home and unsupervised. According to DHS, respondent-mother had failed three drug screens in March, having tested positive for the presence of methamphetamine, opiates, amphetamines, and marijuana.

¶ 5 Finally, DHS alleged that, despite the fact that respondent-mother, the stepfather, and the maternal grandmother had repeatedly denied that they had violated the safety agreement, the agency remained concerned that Rachel was having unauthorized contact with respondent-mother and the stepfather. DHS alleged that its concerns had been validated on

1 April 2019, when Rachel was discovered with respondent-mother and the stepfather at a time when the maternal grandmother was absent.

¶ 6 Within a week after the filing of the juvenile petition, DHS sought leave to amend its petition for the purpose of including additional factual allegations concerning information of which it had been unaware at the time at which the initial petition had been filed. According to the additional allegations set out in the amended petition, the stepfather's probation officer had made an unannounced visit to the home in March 2019; the probation officer had discovered Rachel, respondent-mother, and the stepfather at the residence during his visit; the stepfather had informed the probation officer that Rachel had been placed back in the family home; and an incident involving domestic violence between the stepfather and respondent-mother in Rachel's presence had occurred on 24 March 2019.

¶ 7 On 25 July 2019, Judge Christy E. Wilhelm entered an order determining that Rachel was a neglected and dependent juvenile based, in part, upon respondent-mother's stipulation to the making of findings of fact that were consistent with the allegations that had been made in the amended petition. In addition, Judge Wilhelm ordered that Rachel remain in DHS custody, provided for weekly supervised visitation between respondent-mother and Rachel for a period of one hour, and authorized DHS to expand the amount of time within which respondent-mother was allowed to visit with Rachel as the proceeding progressed. Similarly, Judge Wilhelm ordered respondent-mother to obtain a substance abuse assessment and to comply with any resulting recommendations; to submit to random drug screens; to obtain a comprehensive clinical assessment following a period of sobriety and comply with any resulting recommendations; complete parenting education; adhere to the weekly visitation plan; attend Rachel's medical and dental appointments and educational meetings; obtain and maintain housing that was appropriate for herself and Rachel for a minimum of six months; provide verification that she had sufficient income to provide for herself and Rachel; provide financial support for Rachel; sign any information releases requested by DHS; and maintain bi-weekly contact with the social worker. Finally, Judge Wilhelm established a primary permanent plan of reunification for Rachel, with a secondary plan of legal guardianship.

¶ 8 After a permanency planning hearing held on 12 March 2020, Judge Wilhelm entered an order on or about 2 April 2020 finding that respondent-mother had failed to make adequate progress toward correcting the conditions that had led to Rachel's removal from the family home within a reasonable period of time and that the conditions that had

resulted in Rachel's placement in DHS custody continued to exist because respondent-mother had not participated in substance abuse and parenting education-related services and had failed to consistently visit with Rachel. As a result, Judge Wilhelm ordered that Rachel's primary permanent plan be changed to one of legal guardianship, with a secondary plan of reunification. In addition, Judge Wilhelm reduced the amount of time during which respondent-mother was entitled to visit with Rachel to a period of one hour every other week and ordered respondent-mother to confirm her attendance at least two hours prior to each visit. According to Judge Wilhelm, while Rachel was doing well in her current placement, her foster parents were not interested in serving as a permanent placement for her. On the other hand, respondent-mother's second cousin had expressed an interest in providing Rachel with a permanent placement and was the subject of a home study that was in the process of being performed. As a result, Judge Wilhelm ordered that Rachel be placed with the maternal second cousin in the event that a favorable result was reported at the conclusion of the pending home study.

¶ 9 After another permanency planning hearing held on 11 June 2020, the trial court entered an order on 2 July 2020 finding that the maternal second cousin's home had been approved at the conclusion of the home study and that Rachel had been transitioned to this relative placement on 25 May 2020. In addition, the trial court clarified that Rachel's primary permanent plan involved legal guardianship with a relative. The trial court found that respondent-mother had not visited with Rachel during the past ninety days and that her failure to visit with Rachel had negatively affected the child. As a result, the trial court ordered that respondent-mother's visits with Rachel be terminated until respondent-mother had made herself available to the court and had begun to actively engage in complying with the requirements of her case plan.

¶ 10 In an order entered on 20 October 2020 following a 10 September 2020 permanency planning hearing, Judge Wilhelm found that respondent-mother had continued to make no progress in complying with the requirements of her case plan and that the maternal second cousin had expressed a desire to adopt Rachel. As the result of respondent-mother's failure to make satisfactory progress in addressing the conditions that had led to Rachel's removal from the family home and Rachel's need for a safe, permanent home within a reasonable period of time, Judge Wilhelm changed Rachel's primary permanent plan to one of adoption and ordered DHS to seek the termination of respondent-mother's parental rights in Rachel.

¶ 11 On 11 December 2020, DHS filed a motion in which it alleged that respondent-mother's parental rights in Rachel were subject to termination based upon neglect pursuant to N.C.G.S. § 7B-1111(a)(1), willful failure to make reasonable progress toward correcting the conditions that had led to Rachel's removal from the family home pursuant to N.C.G.S. § 7B-1111(a)(2), willful failure to pay a reasonable portion of the cost of the care that Rachel had received while in DHS custody pursuant to N.C.G.S. § 7B-1111(a)(3), and dependency pursuant to N.C.G.S. § 7B-1111(a)(6) and that the termination of respondent-mother's parental rights would be in Rachel's best interests. During the pendency of the termination motion, the maternal second cousin had a change of heart concerning her interest in adopting Rachel, resulting in Rachel's placement in foster care. After a hearing held on 25 March 2021, the trial court entered an order on 28 May 2021 in which it concluded that respondent-mother's parental rights in Rachel were subject to termination on the basis of each of the grounds for termination alleged in the termination motion, *see* N.C.G.S. § 7B-1111(a)(1)–(3), (6) (2021), and that the termination of respondent-mother's parental rights would be in Rachel's best interests. Respondent-mother noted an appeal to this Court from the trial court's termination order.

II. Analysis

¶ 12 In seeking relief from the trial court's termination order before this Court, respondent-mother argues that the trial court erred by concluding that her parental rights in Rachel were subject to termination and that the termination of her parental rights would be in Rachel's best interests. We will address each of respondent-mother's challenges to the trial court's termination order in the order in which she has presented them in her brief.

A. Adjudication of Grounds

¶ **[1]** "In conducting a termination of parental rights proceeding, the trial court begins by determining whether any of the grounds for termination delineated in N.C.G.S. § 7B-1111(a) exist." *In re A.E.*, 379 N.C. 177, 2021-NCSC-130, ¶ 13 (citing N.C.G.S. § 7B-1109). "At the adjudicatory stage, the petitioner bears the burden of proving by 'clear, cogent, and convincing evidence' the existence of one or more grounds for termination under section 7B-1111(a) of the General Statutes." *In re A.U.D.*, 373 N.C. 3, 5–6, (2019) (quoting N.C.G.S. § 7B-1109(f)). "[A]n adjudication of any single ground in N.C.G.S. § 7B-1111(a) is sufficient to support a termination of parental rights." *In re E.H.P.*, 372 N.C. 388, 395 (2019).

¶ 14 "We review a trial court's adjudication under N.C.G.S. § 7B-1111 'to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *Id.* at 392 (quoting *In re Montgomery*, 311 N.C. 101, 111 (1984)). "A trial court's finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding." *In re B.O.A.*, 372 N.C. 372, 379 (2019) (citing *In re Moore*, 306 N.C. 394, 403–04 (1982)). "Unchallenged findings are deemed to be supported by the evidence and are binding on appeal." *In re R.G.L.*, 379 N.C. 452, 2021-NCSC-155, ¶ 12. "Moreover, we review only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." *In re T.N.H.*, 372 N.C. 403, 407 (2019). "The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 373 N.C. 16, 19 (2019).

¶ 15 A parent's parental rights in a child are subject to termination for neglect pursuant to N.C.G.S. § 7B-1111(a)(1) in the event that the trial court determines that the parent has neglected the juvenile within the meaning of N.C.G.S. § 7B-101. N.C.G.S. § 7B-1111(a)(1) (2021). A neglected juvenile is defined, in pertinent part, as a juvenile "whose parent . . . [d]oes not provide proper care, supervision, or discipline" or "[c]reates or allows to be created a living environment that is injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15)(a), (e) (2021).

> Termination of parental rights based upon this statutory ground requires a showing of neglect at the time of the termination hearing or, if the child has been separated from the parent for a long period of time, there must be a showing of a likelihood of future neglect by the parent. When determining whether such future neglect is likely, the district court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing.

In re R.L.D., 375 N.C. 838, 841 (2020) (cleaned up). "[E]vidence of changed conditions must be considered in light of the history of neglect by the parents and the probability of a repetition of neglect." *In re O.W.D.A.*, 375 N.C. 645, 648 (2020). "A parent's failure to make progress in completing a case plan is indicative of a likelihood of future neglect." *In re M.A.*, 374 N.C. 865, 870 (2020) (quoting *In re M.J.S.M.*, 257 N.C. App. 633, 637 (2018)). On the other hand, "a parent's compliance with his or her case plan does not preclude a finding of neglect." *In re J.J.H.*, 376 N.C. 161, 185 (2020) (citing *In re D.W.P.*, 373 N.C. 327, 339–40 (2020)).

"The determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*." *In re Z.G.J.*, 378 N.C. 500, 2021-NCSC-102, ¶ 26 (quoting *In re Ballard*, 311 N.C. 708, 715 (1984)).

¶ 16 The trial court concluded in its termination order that respondent-mother's parental rights in Rachel were subject to termination for neglect pursuant to N.C.G.S. § 7B-1111(a)(1) "in that [respondent-mother] . . . ha[s] caused [Rachel] to be neglected, as defined in [N.C.G.S.] § 7B-101(a)(15) in that [Rachel] lives in an environment injurious to [her] welfare, [respondent-mother] . . . does not provide proper care, supervision, or discipline, . . . and . . . there is a reasonable probability that such will continue for the foreseeable future."[3] In view of the fact that Rachel had been out of respondent-mother's custody for an extended period of time, the trial court based its determination that respondent-mother's parental rights in Rachel were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(1) on the theory that Rachel had been neglected at an earlier period of time and that she was likely to be subject to further neglect in the event that she was returned to respondent-mother's care. In support of this set of determinations, the trial court found as a fact that:

> 10. On or about July 25, 2019, at an adjudication hearing, after stipulations and consent by the parties, arguments of counsel, and evidence presented, the Court found by clear, cogent and convincing evidence that [Rachel] was neglected and dependent.
>
> 11. . . . [A] case plan was established for [respondent-mother] . . . to address the issues which led to the removal of [Rachel] from the home.
>
> 12. . . . [T]he Court has consistently reviewed [respondent-mother's] progress towards the case plan and [respondent-mother's] efforts to alleviate or remedy the issues which led to the removal of [Rachel] from the home and regain custody of [Rachel]. [Respondent-mother] . . . ha[s] not made

3. Although the trial court also concluded that respondent-mother's parental rights in Rachel were subject to termination on the basis of neglect by abandonment, we need not determine whether the trial court erred in reaching this conclusion in light of our determination that the trial court did not err in concluding that Rachel had been neglected in the past and that it was likely that Rachel would be neglected in the future in the event that she was returned to respondent-mother's care.

reasonable and adequate efforts towards the case plan to ensure the safety of the juvenile. There is a high probability of repetition of neglect of [Rachel] if [she] were returned to [respondent-mother's] . . . custody based upon [her] lack of commitment towards working on the[] case plan[]. The concerns at the time of removal are still a concern, and there have not been any sustained behavior changes shown by [respondent-mother] . . . .

. . . .

14. [Respondent-mother] has made minimal progress on her case plan to alleviate the issues which brought [Rachel] into care. She waited until after the TPR was filed to start working any of her services. Prior to that, [respondent-mother] had not completed any tasks of her case plan in nineteen (19) months. [Respondent-mother's] lack of progress extends beyond substance abuse treatment and concerns with her ability to maintain sobriety into parenting education and visitation with [Rachel] as well. [Respondent-mother] has missed several scheduled appointments that prevent her from receiving ongoing services from her provider, that [respondent-mother] had acknowledged would be very beneficial for her obtaining sobriety and addressing [DHS's] concerns. [Respondent-mother] has made no behavioral changes necessary to ensure [Rachel's] safety.

15. Although [respondent-mother] did attend some assessments in March 2019[,] she did not follow through with recommendations and treatment, including life skills, parenting, individual counseling and intensive outpatient substance abuse program until almost two years later. She did not complete any of these services, but instead did another assessment in September 2020. [Respondent-mother] was consistently testing positive for illegal substances during 2019. During 2020, she did not submit to screens upon request. She did not start submitting to screens again until 2021.

16. [Respondent-mother's] visits were discontinued in June 2020 due to her lack of consistent participation

> and the adverse effects of missing scheduled visits had on [Rachel's] emotional wellbeing. [Respondent-mother] was not engaging in visitations prior to visits being suspended and [her] participation in scheduled visits with [Rachel] has been inconsistent throughout the entirety of the case. [Respondent-mother's] failure to comply with her visitation plan and case plan suggests that providing safe and appropriate care is not a priority for [her].
>
> 17. [Respondent-mother] has never maintained suitable housing throughout the life of this case. Just in January 2021[, she] got a place to stay but has never provided a lease. Similarly, her employment has not been stable. She has bounced around to different jobs over the last few months. Transportation is also not consistent, and she does not have an active driver's license.
>
> 18. . . . . [Respondent-mother] is still married to [the stepfather], who is currently incarcerated in Kentucky. Throughout the life of the underlying case, [respondent-mother] has chosen [the stepfather] and her relationship with him over [Rachel].
>
> . . . .
>
> 32. [Respondent-mother] . . . ha[s] not remedied any of the conditions that led to [Rachel's] removal. [Respondent-mother] . . . ha[s] not shown any behavior changes, or the ability to care for [Rachel's] health, safety, and welfare.

¶ 17 Although respondent-mother "concedes and stipulates to a past adjudication of neglect," she contends that the "trial court cannot support its conclusion of likely future neglect."[4] More specifically, respondent-mother argues that certain of the trial court's findings of fact relating to this issue lack sufficient evidentiary support and that other findings fail to accurately reflect the changes in respondent-mother's

4. Although the trial court stated that there "is a high probability of repetition of neglect if [Rachel] were returned to [respondent-mother's] . . . custody" in Finding of Fact No. 12, this determination is more properly classified as a conclusion of law and will be treated as such for purposes of our review of the trial court's termination order in this case. *See In re D.L.A.D.*, 375 N.C. 565, 571 (2020) (citing *In re J.O.D.*, 374 N.C. 797, 807 (2020)).

circumstances that had occurred following Rachel's removal from the family home.[5]

¶ 18 As an initial matter, respondent-mother argues that the first portion of Finding of Fact No. 17, which states that respondent-mother "never maintained suitable housing," lacks sufficient evidentiary support. In support of this contention, respondent-mother directs our attention to the social worker's testimony that respondent-mother had housing with working utilities and a bedroom that was available for Rachel's use at the time of the termination hearing. Respondent-mother's argument ignores the trial court's determination in the second sentence of Finding of Fact No. 17 that, "[j]ust in January 2021[, respondent-mother] got a place to stay but has never provided a lease." When read in context, Finding of Fact No. 17 indicates that, while the trial court considered respondent-mother's claim to have obtained adequate housing, it also noted that she had failed to verify that she had actually done so. As a result, we hold that Finding of Fact No. 17 is supported by the social worker's testimony that respondent-mother had provided her current address in late January 2021, that the social worker had been able to visit the apartment on 24 March 2021, and that respondent-mother had failed to provide a copy of her lease to DHS despite the social worker's request that she do so.

¶ 19 Although respondent-mother does not argue that the trial court erred by stating in Finding of Fact No. 17 that her employment situation had lacked stability, she does assert that she had made progress in seeking and obtaining employment. A careful review of the record satisfies us that the trial court's findings that respondent-mother's "employment has not been stable" and "[s]he has bounced around to different jobs over the last few months" are supported by testimony provided by both the social worker and respondent-mother herself concerning the nature and extent of respondent-mother's employment. For that reason, we hold that respondent-mother's challenge to the trial court's employment-related findings in Finding of Fact No. 17 lacks merit.

¶ 20 Next, respondent-mother argues that the trial court erred in making Finding of Fact No. 18, which states that she had chosen her relationship with the stepfather over her ability to regain the right to

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5. In view of the fact that a number of the findings of fact that are addressed in respondent-mother's brief as having been made in error are not necessary to the trial court's determination that respondent-mother's parental rights in Rachel were subject to termination on the basis of neglect pursuant to N.C.G.S. § 7B-1111(a)(1), we will refrain from discussing the arguments that respondent-mother has made with respect to those findings in this opinion.

parent Rachel. As an initial matter, respondent-mother concedes that her case plan required her to sever her ties with the stepfather and has failed to argue that the trial court's finding that she remained married to the stepfather lacked sufficient evidentiary support. In addition, we note that the social worker testified that DHS remained concerned that respondent-mother's continued marriage to the stepfather created the possibility that Rachel would have contact with him in the future even though his actions had contributed to Rachel's removal from the family home and even though the stepfather had not made any progress toward satisfying the requirements of his own case plan. On the other hand, the record does not contain any evidence tending to show that any relationship between respondent-mother and the stepfather continued to exist other than the fact that they remained married to each other and does contain evidence tending to show that the stepfather had been incarcerated since April 2019, that respondent-mother had reported shortly after the underlying juvenile case had commenced that she had not been in contact with the stepfather, and that respondent-mother claimed that the stepfather had told her "to move on." As a result, while the record does support the trial court's finding that respondent-mother remained married to the stepfather, it does not support the trial court's finding that respondent-mother had chosen her relationship with the stepfather over the chance to regain the ability to parent Rachel "[t]hroughout the life of the underlying case." For that reason, we will disregard the relevant portion of Finding of Fact No. 18 in determining whether the trial court erred in concluding that respondent-mother's parental rights in Rachel were subject to termination on the basis of neglect pursuant to N.C.G.S. § 7B-1111(a)(1). *See In re L.H.*, 378 N.C. 625, 2021-NCSC-110, ¶ 14 (disregarding factual findings not supported by the record).

¶ 21 Similarly, respondent-mother argues that the trial court erred in making Finding of Fact Nos. 12, 14, and 32 to the extent that these findings reflect a determination that respondent-mother had failed to exhibit the behavioral changes necessary to ensure Rachel's safety and welfare. Although respondent-mother acknowledges that she had failed to make progress toward satisfying the requirements of her case plan for a substantial period of time, she asserts that she "changed her situation substantially" in the months preceding the date upon which the termination hearing was held by completing substance abuse group therapy and a Parenting Lifeskills course and obtaining a comprehensive clinical assessment. For that reason, respondent-mother contends that the trial court failed to adequately account for the evidence relating to the changes that had occurred in her circumstances as of the date of the termination hearing. We do not find this argument persuasive.

¶ 22 As an initial matter, we note that the trial court's unchallenged findings of fact reflect that it did consider evidence concerning the progress that respondent-mother had made in satisfying the requirements of her case plan between the filing of the termination motion on 11 December 2020 and the holding of the termination hearing on 25 March 2021. The trial court stated in the unchallenged portion of Finding of Fact No. 14 that respondent-mother had "waited until after the [termination motion] was filed to start working on any of her services" and that, "[p]rior to that, . . . [she] had not completed any tasks of her case plan in nineteen (19) months." In addition, the trial court stated in unchallenged Finding of Fact No. 15 that, although respondent-mother "did attend some assessments in March 2019, she did not follow through with recommendations and treatment, including life skills, parenting, individual counseling and intensive outpatient substance abuse program until almost two years later." These unchallenged findings of fact, which are binding upon us for purposes of appellate review, *see In re R.G.L.*, 2021-NCSC-155, ¶ 12, demonstrate that the trial court knew of and considered the portions of the record indicating that respondent-mother had made some progress in satisfying the requirements of her case plan during the period of time leading up to the holding of the termination hearing.

¶ 23 In addition, as the Court of Appeals had noted, a "case plan is not just a checklist," with parents being required to "demonstrate acknowledgement and understanding of why the juvenile entered DSS custody as well as changed behaviors." *In re Y.Y.E.T.*, 205 N.C. App. 120, 131(2010). In this case, both the record evidence and the trial court's unchallenged findings of fact show that, while respondent-mother had engaged in substance abuse and parenting education services in the months preceding the termination hearing, she had failed to demonstrate that sustained behavioral change of the type necessary to ensure Rachel's safety and welfare had actually occurred. For example, the trial court found in Finding of Fact No. 15 that, after testing positive for illegal substances during 2019, respondent-mother had refused to submit to drug screens upon request during 2020 and did not resume submitting to such testing until 2021, with her participation in the drug screening process for a period of three months prior to the termination hearing following nineteen months of non-compliance being insufficient to establish that sustained behavioral change had occurred.

¶ 24 Similarly, while the record contains evidence tending to show that respondent-mother completed a Parenting Lifeskills course in December 2020, the trial court stated in Finding of Fact No. 16 that respondent-mother's visits with Rachel had been discontinued in June

2020 because of her inconsistent attendance and the negative effect that her failure to attend scheduled visitation sessions had had on Rachel. Although respondent-mother argues that she did not have a reasonable opportunity to demonstrate that her methods of parenting Rachel had changed because the trial court had conditioned the reinstatement of her visitation with Rachel in February 2021 upon the making of a recommendation that such visits be resumed by Rachel's therapist and because DHS had failed to find a new therapist for Rachel by the time of the termination hearing and cites the decision of the Court of Appeals in *In re Shermer*, 156 N.C. App. 281, 288 (2003), for the proposition that a parent's failure to comply with a case plan provision does not support a decision to terminate that parent's parental rights in the event that the parent has not had adequate time to make the required amount of progress, respondent-mother overlooks the fact that, in *Shermer*, the parent had only had two months within which to attempt to satisfy the requirements of the case plan prior to the termination hearing, *id.*, while, in this case, respondent-mother had had almost two years to satisfy the requirements of her case plan prior to the date of the termination hearing and had failed to fully comply with any of the plan's provisions during that time. In addition, unlike the situation at issue in *Shermer*, respondent-mother had been allowed to visit with Rachel until June 2020, when visitation between the two of them had been discontinued because of respondent-mother's inconsistent attendance and the negative impact that respondent-mother's failures to visit with Rachel had had on the child, with respondent-mother having failed to contact DHS for the purpose of requesting a resumption of her visits with Rachel until November 2020. As a result, respondent-mother's inability to demonstrate that her methods of parenting Rachel had changed resulted, in substantial part, from her own inaction rather than the lack of sufficient time to make such a demonstration.

¶ 25 Finally, the trial court's determination that respondent-mother had failed to demonstrate that she had made the behavioral changes needed to permit her to properly parent Rachel had ample support in the testimony that the social worker provided at the termination hearing. Among other things, the social worker testified that "[DHS] has not seen any behavioral changes"; that, "[f]or the 23 months that [Rachel] has been in foster care, [respondent-mother] only seemed to want to complete the tasks — only complete the tasks of her case plan in the last four months from November up until now" and "has not shown any type of behavioral change"; that there had been "[m]inimal to no efforts to regain custody from [respondent-mother]"; and that DHS remained concerned that the conditions that had led to Rachel's placement in DHS custody had

not been adequately addressed. Thus, we hold that the record evidence and the trial court's undisputed findings of fact adequately support the trial court's determination that respondent-mother had not made the behavioral changes necessary to ensure Rachel's safety and welfare by the time of the termination hearing.

¶ 26 After evaluating respondent-mother's challenges to the trial court's findings of fact, we next examine the validity of respondent-mother's challenge to the trial court's conclusion that it was likely that Rachel would be subject to further neglect in the event that she was returned to respondent-mother's care. Among other things, respondent-mother argues that the progress that she had made in satisfying the requirements of her case plan precluded the trial court from determining that there was a likelihood that the neglect to which Rachel had been subjected would be repeated if she was reunited with respondent-mother. We are not persuaded by this argument.

¶ 27 As an initial matter, "a parent's compliance with his or her case plan does not preclude a finding of neglect," *In re J.J.H.*, 376 N.C. at 185, with this Court having held that the neglect to which a child had been subjected was likely to be repeated despite the fact that the parents had substantially complied with their case plans given that the conditions that had led to the child's removal from the parental home continued to exist at the time of the termination hearing. *See id.* at 185–86; *see also In re D.W.P.*, 373 N.C. 327, 339–40 (2020). In addition, this Court has held that a parent's failure to visit with his or her child is indicative of a likelihood of future neglect. *In re M.Y.P.*, 378 N.C. 667, 2021-NCSC-113, ¶ 20. After carefully reviewing the record, we hold that the trial court's findings relating to respondent-mother's lack of success in complying with the requirements of her case plan until shortly before the date upon which the termination hearing was held, her failure to show the sustained behavioral changes necessary to eliminate the substance abuse and parenting-related concerns that had led to Rachel's removal from the family home, her failure to consistently visit with Rachel, the cessation of her visits with Rachel in June 2020, and her failure to maintain suitable housing, stable employment, and consistent transportation provide ample support for the trial court's determination that there was a likelihood that Rachel would be subjected to further neglect in the event that she was returned to respondent-mother's care. As a result, the trial court did not err by concluding that respondent-mother's parental rights in Rachel were subject to termination on the basis of neglect pursuant to N.C.G.S. § 7B-1111(a)(1).

B. Dispositional Determination

¶ 28 **[2]** Secondly, respondent-mother argues that the trial court erred by concluding that the termination of her parental rights would be in Rachel's best interests. "If a trial court finds one or more grounds to terminate parental rights under N.C.G.S. § 7B-1111(a), it then proceeds to the dispositional stage, at which it determines whether terminating the parent's rights is in the juvenile's best interest." *In re A.E.*, 379 N.C. 177, 2021-NCSC-130, ¶ 13 (cleaned up); *see also* N.C.G.S. § 7B-1110(a) (2021). In making the required "best interests" determination,

> [t]he court may consider any evidence . . . that the court finds to be relevant, reliable, and necessary to determine the best interests of the juvenile. In each case, the court shall consider the following criteria and make written findings regarding the following that are relevant:
>
> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

N.C.G.S. § 7B-1110(a). "We review the trial court's dispositional findings of fact to determine whether they are supported by the evidence received during the termination hearing, with a reviewing court being bound by all uncontested dispositional findings." *In re S.C.C.*, 379 N.C. 303, 2021-NCSC-144, ¶ 22 (cleaned up). "The trial court's assessment of a juvenile's best interests . . . is reviewed for abuse of discretion." *In re E.H.P.*, 372 N.C. at 392. "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re T.L.H.*, 368 N.C. 101, 107 (2015) (cleaned up).

¶ 29 The trial court addressed the required dispositional factors in Finding of Fact No. 33 by stating that

> [Rachel] is approximately 5 years old and doing well in her placement. Even though [Rachel] is not in a pre-adoptive home, the likelihood of adoption is very good. [Rachel] is a very loving little girl, that has no behavioral concerns or other barriers preventing her from being adopted. Her currently [sic] placement is maternal family, that has ultimately decided not to keep [Rachel] long term, but there are two other families already interested in adopting her. Terminating the parental rights of [respondent-mother] . . . would aid in the accomplishment of the permanent plan of adoption for [Rachel]. There is no evidence of any bond between the child and [respondent-mother.]

In addition, the trial court stated in Finding of Fact No. 24 that, even though Rachel's current foster family had decided that it was not interested in keeping her long term, DHS had identified two families that were interested in having Rachel placed with them. Based upon these findings of fact, the trial court concluded that:

> [i]t is in [Rachel's] best interest that the parental rights of [respondent-mother] . . . be terminated based upon the juvenile's age[]; likelihood of the juvenile being adopted; that termination will help achieve the permanent plan for the juvenile; the lack of bond between the juvenile [and respondent-mother] . . . ; and the quality of the relationship between the juvenile and the placements.

¶ 30 Respondent-mother begins her challenge to the trial court's dispositional decision by contending that the trial court's finding that she had no bond with Rachel lacked sufficient evidentiary support. In support of this argument, respondent-mother directs our attention to the existence of evidence that, in her view, demonstrates the erroneous nature of the relevant finding, including assertions contained in the reports that the guardian ad litem had prepared for use at review and permanency planning hearings dating back to 12 December 2019 that Rachel had expressed the desire to return to respondent-mother's home and that respondent-mother "want[ed] to do everything she [could] to get Rachel back." In addition, respondent-mother points to the social worker's testimony that she had witnessed respondent-mother playing and otherwise engaging with Rachel during visits. In light of this evidence, respondent-mother asserts that the trial court's finding concerning the absence of a bond between herself and Rachel was "inaccurate and

demonstrates a concerning lack of attention to a very important consideration[.]" We are not convinced by respondent-mother's argument.

¶ 31 Admittedly, the reports that the guardian ad litem prepared for use at various permanency planning hearings and the social worker's testimony do not suggest that there had never been a bond between Rachel and respondent-mother. On the other hand, however, neither the relevant reports nor the social worker's testimony tend to show that any such bond continued to exist at the time of the termination hearing. In addition, the record reflects that respondent-mother had last visited with Rachel in March 2020, which was approximately one year prior to the termination hearing; and had not seen Rachel since that time. The report that the guardian ad litem submitted in advance of the termination hearing stated that, while "a bond with [respondent-mother] was observed prior to visitation ceasing[,] . . . given the issues that caused visitations to cease[,] . . . the bond that remains in the [guardian ad litem's] opinion is more of a memory for [Rachel] than a continued bond." In addition, the guardian ad litem's termination hearing report did not suggest that Rachel wanted to return to respondent-mother's home and stated, instead, that the child had expressed excitement about being part of the family in her current placement. As a result, we hold that the record contains sufficient evidence to support the trial court's finding that there was no bond between Rachel and respondent-mother and that, even if the evidence did, in fact, tend to show the continued existence of such a bond, there is no question but that, as respondent-mother concedes, that bond was "arguably lessened," with the strength of the remaining bond having been unlikely to change the trial court's "best interests" decision in light of the nature and extent of the evidence concerning the remaining dispositional criteria. *See In re Z.L.W.*, 372 N.C. 432, 437 (2019) (explaining that "the bond between parent and child is just one of the factors to be considered under N.C.G.S. § 7B-1110(a)," with "the trial court [being] permitted to give greater weight to other factors").

¶ 32 Similarly, respondent-mother contends that the trial court's finding that "the likelihood of adoption is very good" lacks sufficient record support. According to respondent-mother, "[t]he only evidence presented tended to show that 'two families are interested,' " with " 'interested' only indicat[ing] a mere possibility, not [a] likelihood." In addition, respondent-mother argues that the trial court failed to fully consider how Rachel's behavioral problems, the lack of a current adoptive placement, and Rachel's ability to connect with a potential placement would impact her adoptability. Once again, we are unable to agree with this aspect of respondent-mother's challenge to the trial court's dispositional decision.

¶ 33 As an initial matter, we note that "the absence of an adoptive placement for a juvenile at the time of the termination hearing is not a bar to terminating parental rights." *In re A.J.T.*, 374 N.C. 504, 512 (2020) (citing *In re A.R.A.*, 373 N.C. 190, 200 (2019), and *In re D.H.*, 232 N.C. App. 217, 223 (2014)). In addition, the trial court specifically addressed the considerations upon which respondent-mother's argument relies by finding that "[Rachel] is a very loving little girl, that has no behavioral concerns or other barriers preventing her from being adopted." An examination of the record satisfies us that this finding and the trial court's determination that "the likelihood of adoption is very good" have ample record support. For example, the social worker testified that "[t]here is a very high likelihood of adoption for [Rachel]" in light of the fact that two families had been identified as being interested in having Rachel live in their home and the fact that Rachel's age would allow her to bond and build a positive relationship with a family. In addition, the social worker asserted that, while Rachel did appear sad and upset at times, the child did not exhibit any extreme behaviors; that Rachel had done well in her current placement; and that Rachel had a good relationship with the family with which she had been placed. Similarly, the guardian ad litem testified that Rachel was "extremely adoptable"; that Rachel was adorable, bright, warm, loving, and emotionally open; and that Rachel connects with other people readily and is easy to talk to. In light of this testimony, respondent-mother's challenge to the sufficiency of the trial court's finding that "the likelihood of adoption was very good" constitutes little more than an impermissible request that we reweigh the record evidence. *See In re R.D.*, 376 N.C. 244, 258 (2020) (explaining that "it is the trial judge's duty to consider all the evidence, pass upon the credibility of the witnesses, and determine the reasonable inferences to be drawn from the testimony" and that the trial court's findings of fact "are binding where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary" (cleaned up)). As a result, the trial court did not err by determining that Rachel's "likelihood of adoption is very good."

¶ 34 Finally, respondent-mother contends that dispositional criteria set out in N.C.G.S. § 7B-1110(a) do not suffice to permit the trial court to make a valid "best interests" determination. According to respondent-mother, we should require trial courts to consider additional dispositional factors set out in the statutes that have been adopted in other jurisdictions in determining whether the termination of a parent's parental rights in a child would be in that child's best interests on the grounds that N.C.G.S. § 7B-1110(a) "does not directly address the progress of the parents and how adoption could affect the child, positively

or negatively, or even if the child understands the concept of adoption." Respondent-mother's argument to the contrary notwithstanding, however, N.C.G.S. § 7B-1110(a)(6) allows the trial court to consider "[a]ny relevant consideration," with this "catch-all" provision serving to afford the trial court a means to consider any additional relevant information aside from the statutorily-enumerated criteria in the course of making its dispositional decision. To the extent that respondent-mother is seeking to have additional factors added to the list of dispositional criteria enumerated in N.C.G.S. § 7B-1110(a), any such argument should be directed to the General Assembly rather than to this Court.

¶ 35 Moreover, we note that the trial court considered the progress that respondent-mother had made in satisfying the requirements of her case plan and that the effect that adoption would have upon Rachel was considered in the underlying juvenile proceeding despite the fact that the trial court did not make any specific dispositional findings relating to those subjects. As we have already noted, the trial court considered respondent-mother's progress toward satisfying the requirements of her case plan in the course of determining that Rachel was likely to be neglected in the event that she was returned to respondent-mother's care. In addition, the decision that Rachel's primary permanent plan should be set as adoption and that such a result would be consistent with Rachel's health, safety, and best interests, *see* N.C.G.S. § 7B-906.1(g) (2021) (requiring the trial court to "make specific findings as to the best permanent plans to achieve a safe, permanent home for the juvenile within a reasonable period of time"); N.C.G.S. § 7B-906.2(a) (2021) (requiring the trial court to adopt a permanent plan that reflects the juvenile's best interests), provides ample basis for believing that the impact of adoption upon Rachel was clearly considered at some point during the underlying juvenile proceeding. Finally, as we have previously determined, the trial court is not required to consider non-termination-related alternatives at the dispositional stage of a termination hearing, *In re N.B.*, 379 N.C. 441, 2021-NCSCS-154 ¶ 26, and is, instead, simply required to determine whether termination of the parent's parental rights would be in the child's best interests.

¶ 36 Thus, for all of these reasons, we hold that the trial court's dispositional findings have sufficient record support and adequately address the criteria enumerated in N.C.G.S. § 7B-1110(a) and that the trial court did not abuse its discretion in the course of concluding that the termination of respondent-mother's parental rights would be in Rachel's best interests. As a result, since the trial court did not err in concluding that respondent-mother's parental rights in Rachel were subject to

termination on the basis of neglect pursuant to N.C.G.S. § 7B-1111(a)(1) and that the termination of respondent-mother's parental rights would be in Rachel's best interests, we affirm the trial court's termination order.

AFFIRMED.

APPENDIXES

JUDICIAL STANDARDS FORMAL ADVISORY OPINION, 2022-01

BUSINESS COURT RULES

JUDICIAL STANDARDS COMMISSION
STATE OF NORTH CAROLINA

FORMAL ADVISORY OPINION: 2022-01

June 16, 2022

QUESTION:

Does a judge have to report monies (s)he receives from the government and certain other eligible entities ("Foster Care Payments") for being a foster parent on the judge's Canon 6 report?

CONCLUSION:

A judge is not required to report Foster Care Payments on his/her annual Canon 6 report filed with the Judicial Standards Commission.

DISCUSSION:

Canon 6 of our Code of Judicial Conduct requires every judge to "regularly file reports of compensation received for quasi-judicial and extra-judicial activities."

Foster Care Payments received by a judge serving as a foster parent are not "compensation" for that service. Rather, these Payments "are considered support for" the foster child. IRS Publication 4694 (Rev. 12-2011). They are not considered income for income tax purposes. *Id.* Further, the North Carolina State Ethics Commission does not require a judge serving as a foster parent to include Foster Care Payments in his/her Statement of Economic Interest filed annually with that Commission.

References:

North Carolina Code of Judicial Conduct Canon 6

ORDER AMENDING THE NORTH CAROLINA BUSINESS COURT RULES

Pursuant to Section 7A-34 of the General Statutes of North Carolina, the Court hereby amends the North Carolina Business Court Rules. This order affects Rules 3, 5, 6, 7, 12, and 15, and Appendix 3.

* * *

Rule 3. Filing and Service

3.1. Mandatory electronic filing. Except as otherwise specified in these rules, all filings in the Court must be made electronically through the Court's electronic-filing system beginning immediately upon designation of the action as a mandatory complex business case by the Chief Justice of the Supreme Court of North Carolina or assignment to a Business Court judge pursuant to Rule 2.1 of the General Rules of Practice. Counsel who appear in the Court are expected to have the capability to use the electronic-filing system. Instructions for filing documents through the Court's electronic-filing system are available on the Court's website. Counsel should exercise diligence to ensure that the description of the document entered during the filing process accurately and specifically describes the document being filed.

3.2. Who may file. A filing through the electronic-filing system may be made by counsel, a person filing on counsel's behalf, or a pro se party. Parties who desire not to use the electronic-filing system may file a motion for relief from using the system, but the Court will grant that relief for counsel only upon a showing of exceptional circumstances. A request by a pro se party to forgo use of the electronic filing system will be determined on a good-cause standard.

3.3. User account. Counsel who appear in the Court in a particular matter ("counsel of record") and pro se parties who are not excused from using the electronic filing system must promptly create a user account through the Court's website. Any person who has established a user account must maintain adequate security over the password to the account.

3.4. Electronic signatures.

(a) **Form.** A document to be filed that is signed by counsel must be signed using an electronic signature. A pro se party must also use an electronic signature on any document that the party is permitted to file by e-mail pursuant to BCR 3.2. An electronic signature consists of a person's typed name preceded by the symbol "/s/." An electronic

signature serves as a signature for purposes of the Rules of Civil Procedure.

(b) **Multiple signatures**. A filing submitted by multiple parties must bear the electronic signature of at least one counsel for each party that submits the filing. By filing a document with multiple electronic signatures, the lawyer whose electronic identity is used to file the document certifies that each signatory has authorized the use of his or her signature.

(c) **Form of signature block**. Every signature block must contain the signatory's name, bar number (if applicable), physical address, phone number, and e-mail address.

3.5. Format of filed documents. ~~All filings must be made in a file format approved by the Court. The Court maintains a list of approved formats on its website.~~Except for exhibits and other supporting materials, documents filed with the Court must be letter size (8½ x 11"), double-spaced, formatted with a margin of at least one inch on each side, and prepared using a proportionally spaced font with serifs that is no smaller than 12-point and no larger than 14-point in size. The Court prefers Century Schoolbook font. Except for proposed orders and proposed jury instructions, each document filed with the Court must be submitted as a PDF file. ~~Pleadings, motions, and briefs filed electronically~~Documents must not be filed in an optically scanned format~~,~~ unless special circumstances dictate otherwise. ~~Proposed orders must be filed in a format permitted by the filing instructions on the Court's website.~~ The electronic file name for each document filed with the Court must clearly identify its contents.

3.6. Time of filing. If a document is due on a date certain, then the document must be filed by 5:00 p.m. Eastern Time on that date, unless the Court orders otherwise.

3.7. Notice of Filing. When a document is filed, the Court's electronic-filing system generates a Notice of Filing. The Notice of Filing appears in the user account for all counsel of record and pro se parties who have created a user account. Filing is not complete until issuance of the Notice of Filing. A document filed electronically is deemed filed on the date stated in the Notice of Filing.

3.8. Notice and entry of orders, judgments, and other matters. The Court will transmit all orders, decrees, judgments, and other matters through the Court's electronic-filing system, which, in turn, will generate a Notice of Filing to all counsel of record. The issuance by the electronic-filing system of a Notice of Filing for any order, decree, or

judgment constitutes entry and service of the order, decree, or judgment for purposes of Rule 58 of the Rules of Civil Procedure. The Court will file a copy of each order, decree, or judgment with the Clerk of Superior Court in the county of venue. If a pro se party is permitted to forgo use of the electronic-filing system under BCR 3.2, the Court will deliver a copy of every order, decree, judgment, or other matter to that pro se party by alternative means.

3.9. Service.

(a) **Service through the Court's electronic-filing system defined**. After an action has been designated as a mandatory complex business case or otherwise assigned to the Court, the issuance of a Notice of Filing is service under Rule 5(b) of the Rules of Civil Procedure. Service by other means is required if the party served is a pro se party who has not established a user account.

(b) **Certificate of Service**. A Notice of Filing is an "automated certificate of service" under Rule 5(b1) of the Rules of Civil Procedure.

(c) **E-mail addresses**. Each counsel of record and pro se party who has established a user account must provide the Court with a current e-mail address and maintain a functioning e-mail system. The Court will issue a Notice of Filing to the e-mail address that a person with a user account has provided to the Court.

(d) **Service of non-filed documents**. When a document must be served but not filed, the document must be served by e-mail unless (i) the parties have agreed to a different method of service or (ii) the Case Management Order calls for another manner of service.

(e) **Service on a pro se party**. All documents filed with the Court must be served upon a pro se party by any method allowed by the Rules of Civil Procedure, unless the Court or these rules direct otherwise.

3.10. Procedure when the electronic-filing system appears to fail. If a person attempts to file a document, but (i) the person is unable for technical reasons to transmit the filing to the Court, (ii) the document appears to have been transmitted to the Court but the person who filed the document does not receive a Notice of Filing, or (iii) some other technical reason prevents a person from filing the document, then the person attempting to file the document must make a second attempt at filing.

If the second attempt fails, the person may (i) continue further attempts to file or (ii) notify the Court of the technical failure by phone call to the judicial assistant for the presiding Business Court judge and e-mail the document for which filing attempts were made to filinghelp@ncbusinesscourt.net. The e-mail must state the date and time of the attempted filings and a brief explanation of the relevant technical failure(s). The e-mail does not constitute e-filing, but serves as proof of an attempt to e-file in order to protect a party in the event of an imminent deadline and satisfies the deadline, notwithstanding BCR 3.7, unless otherwise ordered. The e mail should also be copied to counsel of record. The Court may ask the person to make another filing attempt.

The Court will work with the parties on an alternative method of filing, such as a cloud-based file-sharing system, if the parties anticipate or experience difficulties with filing voluminous materials (e.g., exhibits to motions and final administrative records) using the Court's electronic-filing system. In such event, counsel should contact the presiding Business Court judge's judicial assistant for assistance.

For purposes of calculating briefing or response deadlines, a document filed electronically is deemed filed at the time and on the date stated in the Notice of Filing.

3.11. Filings with the Clerk of Superior Court. Unless otherwise directed by the Administrative Office of the Courts, the Clerk of Superior Court in the county of venue maintains the official file for any action designated to the Court, and the Court is not required to maintain copies of written materials provided to it. Accordingly, material listed in Rule 5(d) of the Rules of Civil Procedure must be filed with the Clerk of Superior Court in the county of venue, either before service or within five days after service.

3.12. Appearances. Counsel whose names appear on a signature block in a court filing need not file a separate notice of appearance for the action. After making an initial filing with the Court, counsel should verify that their names and contact information are properly listed on the docket for the action on the Court's electronic filing system. Counsel whose names do not appear on that docket, but whose names should appear, should contact the judicial assistant for the presiding Business Court judge and request to be added. Out-of-state attorneys may be added to that docket only after admission pro hac vice to appear in the action.

* * *

Rule 5. Protective Orders and Filing under Seal

5.1. General principles.

(a) BCR 5 applies to both parties and non-parties. References to "parties" in this rule therefore include non-parties.

(b) Parties should limit the materials that they seek to file under seal. The party seeking to maintain materials under seal bears the burden of establishing the need for filing under seal.

(c) This rule should not be construed to change any requirement or standard that otherwise would govern the issuance of a protective order.

(d) Parties are encouraged to agree on terms for a proposed protective order that governs the confidentiality of discovery materials when exchanged between or among the parties.

5.2. Procedures for sealed filing.

(a) **Pursuant to a protective order**. The Court may enter a protective order under Rule 26(c) of the Rules of Civil Procedure that contains standards and processes for the handling, filing, and service of sealed documents. Proposed protective orders submitted to the Court should include procedures similar to those described in subsections (b) through (d) of this rule.

(b) **In the absence of a protective order**. In the absence of an order described in BCR 5.2(a), any party that seeks to file a document or part of a document under seal must provisionally file the document under seal together with a motion for leave to file the document under seal. The motion must be filed no later than 5:00 p.m. Eastern Time on the day that the document is provisionally filed under seal. The motion must contain information sufficient for the Court to determine whether sealing is warranted, including the following:

(1) a non-confidential description of the material sought to be sealed;

(2) the circumstances that warrant sealed filing;

(3) the reason(s) why no reasonable alternative to a sealed filing exists;

(4) if applicable, a statement that the party is filing the material under seal because another party (the "designating party") has designated the material under the terms of a protective order in a manner that triggered an obligation to file the material under seal and that the filing party has unsuccessfully sought the consent of the designating party to file the materials without being sealed;

(5) if applicable, a statement that any designating party that is not a party to the action is being served with a copy of the motion for leave;

(6) a statement that specifies whether the party is requesting that the document be accessible only to counsel of record rather than to the parties; and

(7) a statement that specifies how long the party seeks to have the material maintained under seal and how the material is to be handled upon unsealing.

(c) Until the Court rules on the sealing motion, any document provisionally filed under seal may be disclosed only to counsel of record and their staff until otherwise ordered by the Court or agreed to by the parties.

(d) Within five business days of the filing or provisional filing of a document under seal, the party that filed the document should file a public version of the document. The public version may bear redactions or omit material, but the redactions or omissions should be as limited as practicable. In the rare circumstance that an entire document is filed under seal, in lieu of filing a public version of the document, the filing party must file a notice that the entire document has been filed under seal. The notice must contain a non-confidential description of the document that has been filed under seal.

5.3. Role of designating party. If a motion for leave to file under seal is filed by a party who is not the designating party, then the designating party may file a supplemental brief supporting the sealing of the document within seven business days of service of the motion for leave. The supplemental brief must comply with the requirements in BCR 7. In the absence of a brief, the Court may summarily deny the motion for leave and may direct that the document be unsealed.

Rule 5. Sealed Documents and Protective Orders

5.1. General principles.

(a) **"Persons" defined**. References to "persons" in this rule include parties and nonparties who are interested in the confidentiality of a document.

(b) **"Provisionally under seal" defined**. A document is "provisionally under seal" if it is filed electronically with a confidential designation in the electronic-filing system or if it is filed in paper inside of a sealed envelope or container marked "Contains Confidential Information – Provisionally Under Seal."

(c) **Open courts**. A person who appears before the Court should strive to file documents that are open to public inspection and should file a motion to seal a document only if necessary. A person who seeks to have a document sealed bears the burden of establishing the need for sealing the document. Reference to a stipulation or protective order that allows a party to designate a document as confidential is not sufficient to establish that the document should be sealed.

(d) **Scope**. This rule does not apply to documents that are closed to public inspection by operation of statute or other legal authority. This rule does not affect a person's responsibility to omit or redact private information from court documents pursuant to statute or other legal authority.

5.2. Procedure for sealing a document.

(a) **Filing**. A person who seeks to have a document (or part of a document) sealed by the Court must file the document provisionally under seal and file a motion that asks the Court to seal the document. The motion must comply with the requirements of BCR 7.

(b) **Motion**. The motion to seal must contain:

(1) a nonconfidential description of the document the movant is asking to be sealed;

(2) the circumstances that warrant sealing the document;

(3) an explanation of why no reasonable alternative to sealing the document exists;

(4) a statement that specifies whether the document should be accessible only to counsel of record (as opposed to the parties);

(5) a statement that specifies how long the document should be sealed and how the document should be handled upon unsealing;

(6) a statement, if applicable, that (i) the movant is filing the document provisionally under seal because another person has designated the document as confidential and the terms of a protective order require the movant to file the document provisionally under seal and (ii) the movant has unsuccessfully sought the consent of the other person to file the document unsealed; and

(7) a statement, if applicable, that a nonparty who designated the document as confidential under the terms of a protective order has been served with a copy of the motion and notified of the right under BCR 5.2(c) to file a brief in support of the motion.

(c) **Briefing**. A person may file a brief in support of or in opposition to the motion no later than twenty days after having been served with the motion. The Court may extend this deadline for good cause. The brief must comply with the requirements of BCR 7.

(d) **Disclosure pending decision**. Until the Court rules on the motion, a document that is provisionally under seal may be disclosed only to counsel of record and unrepresented parties unless otherwise ordered by the Court or agreed to by the parties.

(e) **Decision by Court**. The Court may rule on the motion with or without a hearing. In the absence of a motion or brief that justifies sealing the document, the Court may order that the document (or part of the document) be made public.

(f) **Public version of document**. If the movant seeks to have only part of a document sealed by the Court, then the movant must file a public version of the document no later than ten days after filing the document provisionally under seal. The public version of the document may include redactions and omissions, but the redactions and omissions should be as limited as practicable.

If the movant filed the document provisionally under seal because another person designated the document as confidential and the terms of a protective order required the movant to file the document provisionally under seal, then the movant must consult with the person who designated the document as confidential before filing the public version of the document.

If the movant seeks to have the entire document sealed, then the movant must file a notice that the entire document has been filed provisionally under seal instead of filing a public version of the document. The notice must contain a nonconfidential description of the document.

5.3. Protective orders. The procedure for sealing a document in BCR 5.2 should not be construed to change any requirement or standard that governs the issuance of a protective order. The Court may therefore enter a protective order that contains standards and processes for the handling, filing, and service of a confidential document. To the extent that a proposed protective order outlines a procedure for sealing a confidential document, the proposed protective order should include (or incorporate by reference) the procedures described in BCR 5.2. Persons are encouraged to agree on terms for a proposed protective order before submitting it to the Court.

* * *

Rule 6. Hearings and Conduct

6.1. Notice of hearing. The Court will typically issue a notice of hearing prior to a hearing. The Court will usually issue the notice at least five business days prior to the hearing. The Court retains the flexibility to convene counsel informally if doing so would advance the interests of justice. A ruling on a motion heard after notice to the parties will not be subject to attack solely because a notice of hearing was not issued as provided by this rule.

6.2. Hearing procedures. ~~The Court may conduct pretrial hearings in person or by any technological means accessible to all parties in an action.~~ Unless otherwise specified, all pretrial hearings will be ~~held~~ conducted in the Business Court courtroom assigned to the presiding Business Court judge. ~~Unless otherwise ordered, or unless the parties agree otherwise, any court reporter transcribing any pretrial hearing or conference will be present in the Business Court courtroom.~~At the Court's discretion, a hearing may be conducted by audio and video transmission in accordance with N.C.G.S. § 7A-49.6.

6.3. Conduct before the Court.

(a) **Addressing the Court**. Counsel should speak clearly and audibly from a standing position behind counsel table or the podium. Counsel may not approach the bench without the Court's request or permission.

(b) **Examination of witnesses and jurors**. Counsel must examine witnesses and jurors from a sitting position behind counsel table or standing from the podium, except as otherwise permitted by the Court. Counsel may only approach a witness for the purposes of presenting, inquiring about, or examining the witness about an exhibit, document, or diagram.

(c) **Professionalism**. Participants in court proceedings must conduct themselves professionally. Adverse witnesses, counsel, and parties must be treated with fairness and civility both in and out of court. Counsel must yield gracefully to rulings of the Court and avoid disrespectful remarks.

6.4. Contact with the Court.

(a) **E-mail**. Any e-mails to the Court about a pending matter must copy ~~at least one~~all pro se parties and all counsel of record for each represented party.

(b) **Contact with court personnel**. Counsel may contact the judicial assistants or law clerks of the Business Court judges to discuss scheduling and logistical matters. Neither counsel nor counsel's professional staff may seek advice or comment from a judicial assistant or law clerk on any matter of substance. Counsel should communicate with Business Court judges, law clerks, and judicial assistants with appropriate professional courtesy.

In the absence of exigent circumstances, and unless ~~opposing counsel has~~the other parties have consented otherwise, any written communication by counsel to court personnel regarding a pending matter must include or copy ~~at least one~~all pro se parties and all counsel of record for each represented party.

6.5. Participation of junior attorneys. To promote the professional development of junior attorneys, the Court welcomes their participation at oral argument.

6.6. Secure leave. Notwithstanding subsections (c) and (e) of Rule 26 of the General Rules of Practice, an attorney must designate his or her secure-leave periods using the Court's electronic-filing system in each case in which the attorney is counsel of record.

* * *

Rule 7. Motions

7.1. Filing. After an action has been designated as a mandatory complex business case or assigned to a Business Court judge under Rule 2.1 of the General Rules of Practice, the Business Court judge to whom the action is assigned will preside over all motions and proceedings in the action, unless and until an order has been entered under N.C.G.S. § 7A-45.4(e) ordering that the case not be designated a mandatory complex business case or the Chief Justice of the Supreme Court of North Carolina revokes approval of the designation.

7.2. Form of motion and brief. ~~All motions must be double-spaced with a margin of at least one inch at the right, left, top, and bottom of each page, and use at least a 12-point proportional font. All motions must be submitted as a PDF file.~~ All motions must be accompanied by a brief (except for those motions listed in BCR 7.10). Each motion must be set out in a separate document. A motion unaccompanied by a required brief may, in the discretion of the Court, be summarily denied. This rule does not apply to oral motions made at trial or as otherwise provided in these rules.

The function of all briefs required or permitted by this rule is to define clearly the issues presented to the Court and to present the arguments and authorities upon which the parties rely in support of their respective positions. A party should therefore brief each issue and argument that the party desires the Court to rule upon and that the party intends to raise at a hearing.

7.3. Consultation. All motions, except those made pursuant to Rules 12, 55, 56, 59, 60, or 65 of the Rules of Civil Procedure, must reflect consultation with and the position of opposing counsel or any pro se parties. The motion must state whether any party intends to file a response.

7.4. Motions decided without a hearing. The Court may rule on a motion without a hearing. Special considerations thought by counsel sufficient to warrant a hearing or oral argument may be brought to the Court's attention in the motion or response.

7.5. Supporting materials and citations. This rule applies to all motions and briefs filed with the Court.

All materials, including affidavits, on which a motion or brief relies must be filed with the motion or brief. Materials that have been filed previously need not be refiled, but the filing party should, using the form ECF No. ___, cite to the docket location of the previously filed materials. In selecting materials to be filed, parties should attempt to limit the use of voluminous materials. If the adequacy of service of process is at issue in any motion, proof of service must be submitted in support of the motion.

The filing party must include an index at the front of the materials. The index should assign a number or letter to each exhibit and should describe the exhibit with sufficient detail to allow the Court to understand the exhibit's contents.

When a brief refers to a publicly available document, the brief may contain a hyperlink to or URL address for the document in lieu of attaching the document as an exhibit. The filing party is responsible for keeping or archiving a copy of the document referenced by hyperlink or URL address.

When a motion or brief refers to any supporting material, the motion or brief must include a pinpoint citation to the relevant page of the supporting material whenever possible. Unless the circumstances dictate otherwise, only the cited page(s) should be filed with the Court in the manner described above.

If a motion or brief cites a decision that is published only in sources other than the West Federal Reporter System, Lexis System, commonly used electronic databases such as Westlaw or LexisNexis, the official North Carolina reporters, or decisions of the Court listed on its website as opinions, then the motion or brief must attach a copy of the decision.

7.6. Responsive briefs. A party that opposes a motion may file a responsive brief within twenty days of service of the supporting brief. This period is thirty days after service for responses to summary judgment motions and for responses to opening briefs in administrative appeals. If a party fails to file a response within the time required by this rule, the motion will be considered and decided as an uncontested motion.

If a motion has been filed without a brief before a case is designated as a mandatory complex business case, then the time period to file a responsive brief begins running only when the moving party files a supporting brief in the Court. A motion filed without a brief before a case is designated as a mandatory complex business case will not be considered by the Court unless and until the moving party files a supporting brief with the Court.

7.7. Reply briefs. Unless otherwise prohibited, a reply brief may be filed within ten days of service of a responsive brief. A reply brief must be limited to discussion of matters newly raised in the responsive brief, and the Court may decline to consider issues or arguments raised by the moving party for the first time in a reply brief. The Court retains discretion to strike any reply brief that violates this rule.

7.8. Length ~~and format~~. Briefs in support of and in response to motions cannot exceed 7,500 words, except as provided in BCR 10.9(c). Reply briefs ~~must also be double-spaced and~~ cannot exceed 3,750 words. These word limits include footnotes and endnotes but do not include the case caption, any index, table of contents, or table of authorities, signature blocks, or any required certificates.

A party may not incorporate by reference arguments made in another brief or file multiple motions to circumvent these limits.

A party may request the Court to expand these limits but must make the request no later than five days before the deadline for filing the brief. Word limits will be expanded only upon a convincing showing of the need for a longer brief.

Each brief must include a certificate by the attorney or party that the brief complies with this rule. Counsel or pro se parties may rely on the word count of a word-processing system used to prepare the brief.

In the absence of a court order, all parties who are jointly represented by any law firm must join together in a single brief. That single brief may not exceed the length limits in this rule.

~~All briefs must be double-spaced with a margin of at least one inch at the right, left, top, and bottom of each page, and use at least a 12-point proportional font. All briefs must be submitted as a PDF file.~~

7.9. Suggestion of subsequently decided authority. In connection with a pending motion, a party may file a suggestion of subsequently decided authority after briefing has closed. The suggestion must contain the citation to the authority and, if the authority is not available on an electronic database, a copy of the authority. The suggestion may contain a brief explanation, not to exceed 100 words, that describes the relevance of the authority to the pending motion. Any party may file a response to a suggestion of subsequently decided authority. The response may not exceed 100 words and must be filed within five days of service of the suggestion.

7.10. Motions that do not require briefs. Briefs are not required for the following motions:

(a) for an extension of time, provided that the motion is filed prior to the expiration of the time to be extended;

(b) to continue a pretrial conference, hearing, or trial of an action;

(c) to add parties;

(d) consent motions, unless otherwise ordered by the Court;

(e) to approve fees for receivers, special masters, referees, or court appointed experts or professionals;

(f) for substitution of parties;

(g) to stay proceedings to enforce a judgment;

(h) to modify the case-management process pursuant to BCR 9.1(a), provided that the motion is filed prior to the expiration of the case-management deadline sought to be extended;

(i) for entry of default;

(j) for pro hac vice admission; ~~and~~

(k) motions in limine complying with BCR 12.9~~.~~;

(l) to seal confidential information (except as provided by BCR 5.~~3~~)~~.~~;

(m) to withdraw as counsel; and

(n) for a bill of costs.

These motions must state the grounds for the relief sought, including any necessary supporting materials, and must be accompanied by a proposed order.

7.11. Late filings. Absent a showing of excusable neglect or as otherwise ordered by the Court, the failure to timely file a brief or supporting material waives a party's right to file the brief or supporting material.

7.12. Motions decided without live testimony. Unless the Court orders otherwise, a hearing on a motion, including an emergency motion, will not involve live testimony. A party who desires to present live testimony must file a motion for permission to present that testimony. In the absence of exigent circumstances, the motion must be filed promptly after receiving notice of the hearing and may not exceed 500 words. After the motion is filed, the Court will either (i) issue an order that requests a response, (ii) deny the motion, or (iii) issue an order with further instructions. The opposing party is not required to file a response

unless ordered by the Court. If the Court elects to conduct a telephone conference on the motion, then the Court may decide the motion during the conference.

7.13. Emergency motions prior to designation.

(a) **Actions in which a Notice of Designation was filed when the action was initiated**. If a party seeks to have an emergency motion heard in the Court, the party should contact the Chief Justice of the Supreme Court of North Carolina promptly after filing the Notice of Designation and request expedited designation of the case as a mandatory complex business case. The party should also promptly contact the Court's Trial Court Coordinator and advise that the party seeks to have an emergency motion heard in the Court.

(b) **Actions subsequently designated as mandatory complex business cases**. If a party has filed an emergency motion in an action before a Notice of Designation has been filed, and the action is later designated as a mandatory complex business case or assigned to a Business Court judge under Rule 2.1 of the General Rules of Practice, then the emergency motion will be heard by the Business Court judge to whom the action has been assigned as provided by N.C.G.S. § 7A-45.4(e). If, however, the emergency motion is heard by a non-Business Court judge prior to designation or assignment, then, barring exceptional circumstances, the Business Court judge will defer to the judge who heard the motion.

(c) **Briefing**. When a party moves for emergency relief under BCR 7.13(a) or (b), the Court will, if practicable, establish a briefing schedule for the motion. A party that moves for emergency relief under BCR 7.13(a) must file a supporting brief that complies with these rules. The Court's briefing schedule for a BCR 7.13(a) motion will establish deadlines for a response and, in the Court's discretion, a reply.

Unless the Court orders otherwise, the length restrictions in BCR 7.8 apply to all briefs filed under this rule.

7.14. Amicus briefs.

(a) **When permitted**. An amicus curiae may file a brief only with leave of the Court.

(b) **Motion for leave**. A motion for leave to file an amicus brief must state the nature of the movant's interest, the issues that the amicus brief would address, the movant's position on those issues, and the reasons that an amicus brief would aid the Court. The motion must also attach the proposed amicus brief. The Court will generally rule on the motion without a response or argument.

(c) **Deadline for filing**. A motion for leave to file an amicus brief must be filed no later than the deadline for the brief of the party supported.

(d) **Method of filing**. The motion and proposed amicus brief must be filed consistent with BCR 3.

(e) **Contents~~,~~ and length~~, and form~~**. An amicus brief may not exceed 3,750 words and must comply with all other aspects of BCR 7.8. The brief must also state whether (i) a party's counsel authored the brief, (ii) a party or party's counsel paid for the preparation of the brief, and (iii) anyone other than the amicus curiae paid for the brief and, if so, their identities.

(f) **Response**. A party must obtain leave to file a separate response to an amicus brief. If the Court provides leave, the response must be limited to points and authorities presented in the amicus brief. The response may not exceed 3,750 words. An amicus curiae may not file a reply brief.

(g) **Oral argument**. An amicus curiae may not participate in oral argument without leave of the Court.

* * *

Rule 12. Pretrial and Trial

12.1. Case-specific pretrial and trial management. The Court may modify the deadlines and requirements in this rule as the circumstances of each case dictate.

12.2. Trial date. The Court will establish a trial date for every case. The Court may establish that date in the Case Management Order or otherwise. The Court ordinarily will not set a trial to begin fewer than sixty days after the Court issues a ruling on any post-discovery dispositive motions.

Trial dates should be considered peremptory settings. Any party who foresees a potential conflict with a trial date should advise the Court no later than fourteen days after being notified of the trial date. In addition, after the Court sets a trial date, counsel of record should avoid

setting any other matter for trial that would conflict with the trial date. Absent extraordinary and unanticipated events, the Court will not consider any continuance because of conflicts of which it was not advised in conformity with this rule.

12.3. Pretrial process. The following chart sets forth standard pretrial activity with presumptive deadlines.

45 days before pretrial hearing	Trial exhibits (or a list of exhibits identified by Bates number if the exhibits were exchanged in discovery) and witness lists served on opposing parties
30 days before pretrial hearing	Deposition designations served on opposing parties
21 days before pretrial hearing	Pretrial attorney conference Deposition counter-designations and objections to deposition designations served on opposing parties Supplemental trial exhibit and witness lists served on opposing parties
17 days before pretrial hearing	Objections to trial exhibits served on opposing parties
14 days before pretrial hearing	Motions in limine and briefs in support, if any, filed and served Proposed pretrial order filed and served
7 days before pretrial hearing	Responses to motions in limine filed and served
No later than 14 days before trial	Pretrial hearing
7 days before trial	Trial brief, if any, filed and served Proposed jury instructions filed and served Proposed findings of fact and conclusions of law, if necessary, filed and served Submit joint statement of any stipulated facts

12.4. Pretrial attorney conference. Counsel are responsible for conducting a pretrial conference. At the conference, the parties should discuss the items listed in the Court's form pretrial order. Lead trial counsel (and local counsel, if different) for each party must participate in the conference. The conference may be an in-person conference or conducted through remote means.

12.5. Proposed pretrial order. Counsel are responsible for preparing a proposed pretrial order. Appendix 5 to these rules contains a Proposed Pretrial Order template. The parties are encouraged to use the form order to prepare their own order but may also deviate from the form order as the nature of the case dictates. The proposed order should generally include the following items:

(a) stipulations about the Court's jurisdiction over the parties and the designation and proper joinder of parties;

(b) a list of trial exhibits (other than exhibits that might be used for rebuttal or impeachment) and any objections to those exhibits;

(c) the timing and manner of the exchange of demonstrative exhibits or any proposed exhibits not produced in discovery including whether demonstrative exhibits will be used in opening statements;

(d) a list of trial witnesses, including witnesses whose testimony will be presented by deposition;

(e) a list of outstanding motions and motions that might be filed before or during trial;

(f) a list of issues to be tried, noting (if needed) which issues will be decided by the jury and which will be decided by the Court;

(g) the technology that the parties intend to use, including whether that technology will be provided by the Court or by the parties;

(h) whether the parties desire to use real-time court reporting and, if so, how the parties will apportion the costs of that reporting;

(i) any case-specific issues or accommodations needed for trial, such as use of interpreters, use of jury questionnaires, or measures to be employed to protect information that might merit protection under Rule 26(c)(vii) of the Rules of Civil Procedure;

(j) a statement that all witnesses are available and the case is trial-ready;

(k) an estimate of the trial's length; and

(l) a certification that the parties meaningfully discussed the possibility and potential terms of settlement at the pretrial attorney conference.

12.6. Deposition designations. If a party desires to present deposition testimony at trial, then the party must designate that testimony by page and line number of the deposition transcript. A party served with deposition designations may serve objections and counter-designations; the objecting party must identify a basis for each objection.

All designations, counter-designations, and objections should be exhibits to the proposed pretrial order. In addition, the party that designates deposition testimony to which another party objects must provide the presiding judge with a chart in Microsoft Word format that lists (i) the testimony offered to which another party objects, (ii) the objecting party, (iii) the basis for the objection, and (iv) a blank line on which the presiding judge can write his or her ruling.

12.7. Pretrial hearing. The Court will conduct a pretrial hearing no later than fourteen days before trial. Lead counsel (and local counsel, if different) for each party must attend the hearing ~~in person~~. The Court may order a party with final settlement authority to attend the pretrial hearing, but no party will be required to attend unless ordered by the Court. The pretrial hearing may include any matter that the Court deems relevant to the trial's administration, including but not limited to:

(a) a discussion of the items in the proposed pretrial order;

(b) argument and ruling on any pending motions and objections, including objections to exhibits and deposition designations included in the proposed pretrial order;

(c) the resolution of any disagreement about the issues to be tried;

(d) unique jury issues, such as preliminary substantive jury instructions, juror questionnaires, or jury sequestration;

(e) the use of technology;

(f) the need for measures to protect information under Rule 26(c)(vii) of the Rules of Civil Procedure; and

(g) whether any further consideration of settlement is appropriate.

12.8. Final pretrial order. The Court will enter a final pretrial order.

12.9. Motions in limine. Unless the Court orders otherwise, briefs regarding motions in limine are not required if the grounds for the motion are evidenced by the motion itself. Opening and response briefs may not exceed 3,750 words. Reply briefs will only be permitted in exceptional circumstances with the Court's permission or at the request of the Court. The Court may elect to withhold its ruling on a motion in limine until trial, and any ruling the Court may elect to make on a motion in limine prior to trial is subject to modification during the course of the trial.

12.10. Jury instructions.

(a) **Timing**. When filing proposed jury instructions, a party must also e-mail a copy of the proposed jury instructions in Microsoft Word format to the judicial assistant for the presiding Business Court judge.

(b) **Issues**. In addition to the form as provided below, the jury instructions must state the proposed issues to be submitted to the jury.

(c) **Form**.

(1) Every instruction should cite to relevant authority, including but not limited to the North Carolina Pattern Jury Instructions.

(2) Each party should file two different copies of its proposed instructions: one copy with the citations to authority, and one copy without those citations.

(3) Proposed instructions should contain an index that lists the instruction number and title for each proposed instruction.

(4) Each proposed instruction should be on its own separate page, should be printed at the top of the page, and should receive its own number. The proposed instructions should be consecutively numbered.

(5) If the parties propose a pattern jury instruction without modification to that instruction, then the parties may simply refer to the instruction number. If the parties propose a pattern instruction with any modification, then the parties should clearly identify that modification.

(d) **Preliminary instructions**. The parties may further propose that the Court provide the jury preliminary instructions prior to the presentation of the evidence. In that event, the parties must provide the proposed form of any such preliminary instructions and the parties' proposal as to the time at which such preliminary instructions will be presented.

12.11. Proposed findings of fact and conclusions of law. The Court may require each party in a non-jury matter to file proposed findings of fact and conclusions of law.

12.12. Trial briefs. Unless ordered by the Court, a party may, but is not required to, submit a trial brief. A trial brief may address contested issues of law and anticipated evidentiary issues (other than those raised in a motion in limine). The trial brief need not contain a complete recitation of the facts of the case. A party may not file a brief in response to another party's trial brief unless the Court requests a response. Unless otherwise ordered by the Court, a trial brief is not subject to the word limits for briefs under BCR 7.

12.13. Stipulated facts. If the parties intend to file a joint statement of any stipulated facts other than any stipulated facts listed in the proposed pretrial order, then the parties must file the statement before the trial begins. The statement should also explain when and how the parties propose that the stipulations be presented to the jury. If the parties cannot agree on when and how the stipulated facts should be presented to the jury, then the Court will decide this issue before jury selection.

* * *

Rule 15. ~~Receivers~~[Reserved]

~~**15.1. Applicability**~~.

~~(a) This rule governs practice and procedure in receivership matters before the Court.~~

~~(b) The term "receivership estate," as used in this rule, refers to the entity, person, or property subject to the receivership.~~

~~**15.2. Selection of receiver.** On motion or on its own initiative, and for good cause shown, the Court may appoint a receiver as provided by law.~~

~~(a) **Qualifications**. A receiver must have sufficient competence, impartiality, and experience to administer the receivership estate and otherwise perform the duties of the receiver.~~

(b) **Motion to appoint receiver**. When a party moves the Court to appoint a receiver, the party should propose candidates to serve as receiver. The motion should explain each candidate's qualifications. The motion should also disclose how the receiver will be paid, including the proposed funding source. A proposed order describing the receiver's duties, powers, compensation, and any other issues relevant to the receivership must be filed with the motion to appoint a receiver. Non-movants may respond to the motion within twenty days of service of the motion. The Court may appoint one of the proposed receivers or, in its discretion, a different receiver. The Court may also propose or require a different fee arrangement for the receiver.

(c) **Ex parte appointment of receiver**. The Court will not appoint a receiver on an ex parte basis unless the moving party shows that a receiver is needed to avoid irreparable harm. A receiver appointed on an ex parte basis will be a temporary receiver pending further order of the Court.

(d) **Sua sponte appointment of receiver**. If the Court appoints a receiver on its own initiative, then any party may file an objection to the selected receiver and propose an alternative receiver within ten days of entry of the order appointing the receiver. The objection should contain the information listed in BCR 15.2(b) about the alternative proposed receiver.

(e) **Duties, powers, compensation, and other issues**. When appointing a receiver, the Court will enter an order that outlines the receiver's duties, powers, compensation, and any other issues relevant to the proposed receivership. Appendix 3 to these rules contains a non-exclusive list of provisions that might be appropriate for a receivership order.

15.3. Removal. The Court may remove any receiver for good cause shown.

* * *

Appendix 3. Potential Terms of Receivership Order[Reserved]

This appendix contains potential terms for an order under BCR 15.2(e).

1. Duties.

(a) **Acceptance of receivership**. The Court's order may identify a deadline for the proposed receiver to file an acceptance of receivership and give notice of the receiver's bond if required under North Carolina law or by order of the Court. The order may require that the acceptance be served on all counsel and certify that the receiver will:

(1) act in conformity with North Carolina law and rules and orders of the Court;

(2) avoid conflicts of interest;

(3) not directly or indirectly pay or accept anything of value from the receivership estate that has not been disclosed and approved by the Court;

(4) not directly or indirectly purchase, acquire, or accept any interest in the property of the receivership estate without full disclosure and approval by the Court; and

(5) otherwise act in the best interests of the receivership estate.

(b) **Notice of appointment**. The Court's order may direct a deadline for the receiver to provide notice of entry of the order of appointment to any known creditor of the receivership estate and any other person or entity having a known or recorded interest in all or any part of the receivership estate.

(c) **Inventory**. The Court's order may set a deadline for the receiver to file with the Court an itemized and complete inventory of all property of the receivership estate, the property's nature and possible value as nearly can be ascertained, and an account of all known debts due from or to the receivership estate.

(d) **Initial written plan**. The Court's order may set a deadline for the receiver to file an initial written plan for the receivership estate. The order may require the plan to identify:

(1) the circumstances leading to the institution of the receivership estate;

(2) whether the goal of the receivership is to preserve and operate any business within the estate, to liquidate the estate, or to take other action;

(3) the anticipated costs likely to be incurred in the administration of the receivership estate;

(4) the anticipated duration of the receivership estate;

(5) if an active business is to be operated, the number of employees and estimated costs needed to do so;

(6) if property is to be liquidated, the estimated date by which any appraisal and sale by the receiver will occur, and whether a public or private sale is contemplated; and

(7) any pending or anticipated litigation or legal proceedings that may impact the receivership estate.

(e) **Updated plans**. The Court's order may require the receiver to file updated plans on a periodic basis, such as every ninety days. The order may require that each updated plan (i) summarize the actions taken to date measured against the previous plan, (ii) list anticipated actions, and (iii) update prior estimates of costs, expenses, and the timetable needed to complete the receivership.

(f) **Periodic reports**. The Court's order may require the receiver to file periodic reports, such as every thirty days, that itemize all receipts, disbursements, and distributions of money and property of the receivership estate.

(g) **Liquidation and notice**. The Court's order may provide terms relating to the liquidation of the receivership estate—including terms that require the receiver to afford reasonable opportunity for creditors to present and prove their claims pursuant to N.C.G.S. § 1-507.6. The order may also require the receiver, upon notice to all parties, to request that the Court fix a date by which creditors must file a written proof of claim and to propose to the Court a schedule and method for notice to creditors.

(h) **Report of claims**. The Court's order may provide a deadline for the receiver to file a report as to claims made pursuant to N.C.G.S. § 1-507.7, with service on all parties and on all persons or entities who submitted a proof of claim. The Court's order may set out guidelines for the report, such as requiring recommendations on the treatment of claims (i.e., whether they should be allowed or denied

(in whole or in part) and the priority of such claims) and setting a deadline for objections to the report.

(i) **Final report**. The Court's order may require the receiver, before the receiver's discharge, to file a final written report and final accounting of the administration of the receivership estate.

2. **Powers**. The Court may issue an order that sets forth the powers of the receiver, in addition to the powers and authorities available to a receiver under statutory and/or common law. The powers stated in the order may include the power:

- to take immediate possession of the receivership assets, including any books and records related thereto;
- to dispose of all or any part of the assets of the receivership estate wherever located, at a public or private sale, if authorized by the Court;
- to sue for and collect all debts, demands, and rents of the receivership estate;
- to compromise or settle claims against the receivership estate;
- to enter into such contracts as are necessary for the management, security, insuring, and/or liquidation of the receivership estate;
- to employ, discharge, and fix the compensation and conditions for such agents, contractors, and employees as are necessary to assist the receiver in managing, securing, and liquidating the receivership estate; and
- to take actions that are reasonably necessary to administer, protect, and/or liquidate the receivership estate.

3. **Compensation and expenses**.

(a) **Timing of compensation application**. The Court's order may require a receiver that seeks fees to file an application with the Court and serve a copy upon all parties and all creditors of the receivership estate. The application may be made on an interim or final basis and must advise the parties and creditors of the receivership estate that any objection to the application must be filed within seven days of service of the notice.

(b) **Substance of application**. The Court's order may require that a receiver's application for fees include a

~~description in reasonable detail of the services rendered, time expended, and expenses incurred; the amount of compensation and expenses requested; the amount of any compensation and expenses previously paid to the receiver; the amount of any compensation and expenses that the receiver has been or will be paid by any source other than the receivership estate; and a disclosure of whether the compensation would be divided or shared with anyone other than the receiver.~~

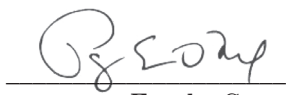
~~(c) **Notice of hearing on application**. The Court's order may require the receiver to notify all creditors of the receivership estate of the date, time, and location of any hearing that the Court sets on the receiver's fee application.~~

* * *

These amendments to the North Carolina Business Court Rules become effective on 1 July 2022.

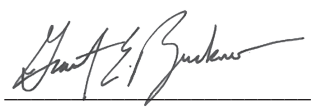
These amendments shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 15th day of June 2022.



For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 15th day of June 2022.



GRANT E. BUCKNER
Clerk of the Supreme Court

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CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

minimal contact with the children throughout that three-year period (during which the children developed a stronger bond with the grandmother than with the mother) and made no attempts to regain custody until social services got involved indicated that she intended for the grandmother to serve indefinitely as the children's primary caregiver. **In re B.R.W., 61.**

CIVIL PROCEDURE

Motion to dismiss—matters outside the pleadings—arguments of counsel not evidence—no conversion to motion for summary judgment—On a motion to dismiss a medical negligence claim pursuant to Civil Procedure Rule 12(b)(6), where the trial court did not consider matters outside the pleadings, it was not required to convert the motion to one for summary judgment under Civil Procedure Rule 56, which would have necessitated giving the parties additional time to conduct discovery and present evidence. Although plaintiff's counsel made several factual assertions in his memorandum of law and during the hearing, arguments of counsel are not evidence, and no evidentiary materials were submitted. The matter was remanded to the Court of Appeals for consideration of two remaining issues. **Blue v. Bhiro, 1.**

Presumption of regularity—order terminating parental rights—signed by judge who did not preside over hearing—administrative and ministerial action—An order terminating respondent-mother's parental rights, signed by the chief district court judge after the judge who had presided over the hearing retired—which stated in an unchallenged finding that the findings of fact, conclusions of law, and decretal had been announced in chambers by the now-retired judge, and that the order was administratively and ministerially signed by the chief district court judge—was held to be properly entered in an administrative and ministerial capacity pursuant to Civil Procedure Rules 52 and 63 where respondent-mother failed to rebut the presumption of regularity. **In re E.D.H., 395.**

Rules 52 and 63—order terminating parental rights—new findings made by substitute judge without hearing evidence—improper judicial action—An order terminating a father's parental rights to his child was vacated as a nullity where, after a prior termination order was vacated on appeal, remanded, and the matter assigned to a substitute judge (due to the original judge being deceased), the substitute judge acted in a judicial and not merely a ministerial manner by making new findings—beyond what appeared in the initial order—based on evidence the judge did not personally hear. Civil Procedure Rules 52 and 63 do not permit a substitute judge who did not preside over a matter to make new findings of fact and conclusions of law. **In re K.N., 823.**

CONSTITUTIONAL LAW

Effective assistance of counsel—termination of parental rights—prejudice analysis—In a termination of parental rights matter, respondent-mother failed to show prejudice and therefore was not entitled to relief on her claim of ineffective assistance of counsel—in which she alleged that her counsel failed to ensure respondent was present at the hearings, seek visitation, file a response to the termination petition, assert due process claims, or advocate sufficiently. Based on evidence of numerous communications between respondent and her counsel throughout the proceedings, and respondent's failure to complete any part of her case plan despite

CONSTITUTIONAL LAW—Continued

understanding what was expected, she did not demonstrate that there was a reasonable probability of a different outcome absent the alleged errors by counsel. **In re B.B., 343.**

Right to speedy trial—Barker factors—evaluation of prejudice to defendant—misapplication of correct standard—In a prosecution for charges stemming from a fatal car accident, where more than six years passed before defendant's case was brought to trial, the trial court misapplied the proper standard for determining whether the delay prejudiced defendant pursuant to *Barker v. Wingo*, 407 U.S. 514 (1972), by first finding that the State had been prejudiced by the delay, and by determining that the prejudice factor weighed against defendant because he did not demonstrate actual prejudice. The constitutional right to a speedy trial is granted to defendants to protect against prosecutorial delay, and prejudice may be shown by presumptive rather than actual prejudice. **State v. Farook, 170.**

CRIMINAL LAW

Guilty plea—multiple assault charges—insufficient factual basis—remedy—entire plea vacated—Where there was an insufficient factual basis to support defendant's plea of guilty to multiple assaults—because defendant committed one continuous assault—the appropriate remedy was to vacate the entire plea and remand to the trial court for further proceedings. **State v. Robinson, 207.**

EVIDENCE

Attorney-client privilege—speedy trial claim—defense attorney testified for State regarding trial strategy—plain error—In a prosecution for charges stemming from a fatal car accident, where more than six years passed before defendant's case was brought to trial, during which he was represented by four different attorneys, the trial court committed plain error by allowing one of defendant's attorneys to testify for the State regarding trial strategy to counter defendant's claim that his right to a speedy trial was violated. The attorney's testimony regarding delay tactics divulged privileged communications in the absence of any waiver by defendant of the attorney-client privilege; defendant's pro se claim for ineffective assistance of counsel regarding his attorney's delays was invalid for having been filed when defendant was represented by counsel and therefore could not constitute a waiver or justification. The matter was remanded for the trial court to reweigh any admissible evidence submitted by the State to justify the delay as part of the balancing test set forth in *Barker v. Wingo*, 407 U.S. 514 (1972). **State v. Farook, 170.**

Lay opinion—assumed error—prejudice analysis—Even assuming that admission of an officer's allegedly improper lay opinion testimony—his belief that a crashed moped was driven by defendant—was error, defendant could not prove prejudice where other evidence admitted at his trial for driving while impaired included substantially similar information. Specifically, the warrant application (to draw defendant's blood) and defense counsel's cross-examination of the officer put essentially the same information before the jury. **State v. Delau, 226.**

HOMICIDE

Sufficiency of evidence—reasonable inference—circumstantial evidence—large sum of cash—There was sufficient evidence to withstand defendant's motion

HOMICIDE—Continued

to dismiss the charges of robbery with a dangerous weapon and first-degree murder where, among other things, defendant was a crack cocaine addict who had frequently borrowed cash from the victim and others, the victim had been known to carry large sums of cash, investigators found no money in the victim's residence, defendant lacked legitimate financial resources, defendant had approximately $3,000 of cash in a concealed location after the murder, cell phone records showed that defendant was in the vicinity of the victim's residence on the night of the murder, there was no sign of forced entry into the victim's residence, defendant indicated before the victim's body was discovered that he knew the victim would not be returning to work, defendant made false and contradictory statements to the police, and defendant had deleted all of the call and text message history from his phone up until the morning that the victim's body was found. Defendant had the motive, opportunity, and means to commit the crimes. **State v. Dover, 535.**

IMMUNITY

Public official immunity—police officer—individual capacity—malice—summary judgment not appropriate—Where plaintiff, in asserting civil tort claims against a police officer in his individual capacity, forecast sufficient evidence to raise genuine issues of material fact regarding whether the officer acted with malice—including whether he used unnecessary and excessive force—when he arrested plaintiff for resisting an officer, the officer was not entitled to summary judgment based on the defense of public official immunity. Evidence that the plainclothes officer acted contrary to his duty and with intent to injure plaintiff included plaintiff's claims that the officer "body slammed" him against the trunk of his car; that the officer refused to loosen the handcuffs, which were tight enough to leave marks on plaintiff's wrists; and that the officer suggested to plaintiff that if he had done as he was initially told, then he would not have been handcuffed in front of his neighbors. **Bartley v. City of High Point, 287.**

JURISDICTION

Personal—minimum contacts—nonresident business—services agreement—substantial connection with North Carolina—In a breach of contract action brought by a North Carolina-based company (plaintiff) against a nonresident business (defendant), the trial court did not err by determining that defendant was subject to personal jurisdiction in North Carolina based on unchallenged findings establishing that the services agreement entered into by both parties—under which plaintiff was to maintain and repair point-of-sale equipment from defendant's stores—had a substantial connection with North Carolina. Due process was not offended where defendant intentionally solicited plaintiff, which it knew to be based in North Carolina; the parties entered into a multiyear contract for ongoing services; the contract required any written notices to be sent to plaintiff in North Carolina; and plaintiff shipped thousands of parts from and performed thousands of repairs at its depot in North Carolina to meet its contractual obligations. **Toshiba Glob. Com. Sols., Inc. v. Smart & Final Stores LLC, 692.**

NEGLIGENCE

Negligent hiring—elements—nexus between employment and injury—sufficiency of evidence—In an action brought against a home health agency based on a

NEGLIGENCE—Continued

theory of negligent hiring after an aide the agency placed in plaintiffs' home orchestrated an off-duty home break-in and robbery of that home, the trial court properly denied the agency's motions for directed verdict and judgment notwithstanding the verdict because the evidence taken in the light most favorable to plaintiffs was sufficient on each element necessary to prove negligent hiring and to support a nexus between the aide's employment and the harm suffered by plaintiffs, which created a duty on the part of the agency. The harm to plaintiffs was foreseeable where the agency did not conduct a criminal background check on the aide, the aide provided false information on her job application, and the aide used information gained through her employment in plaintiffs' home to facilitate the robbery. **Keith v. Health-Pro Home Care Servs., Inc., 442.**

Negligent hiring—requested jury instruction—inclusion of elements not required—In an action brought against a home health agency based on a theory of negligent hiring after an aide the agency placed in plaintiffs' home orchestrated an off-duty home break-in and robbery of that home, the trial court properly denied the agency's request for the pattern jury instruction on negligent hiring, since it was not an accurate statement of the law in this case with regard either to the necessary elements of the claim or to the competency of the employee. To the extent the pattern instruction misstated the elements as set forth in case law, the Supreme Court recommended it be withdrawn and revised. **Keith v. Health-Pro Home Care Servs., Inc., 442.**

REAL PROPERTY

Covenants—restrictive—solar panel installation—denial of application—N.C.G.S. § 22B-20—The denial by an architectural review committee (ARC) of defendant property owners' application to install solar panels on the roof of their house violated the plain and unambiguous meaning of N.C.G.S. § 22B-20, which generally prohibits restrictions on solar collectors unless either one of two exceptions is met. In this case, where the subdivision's declaration of covenants did not expressly prohibit solar panels or mention solar panels at all, but still could have had the effect of restricting their installation (by granting authority to the ARC to refuse any improvements for aesthetic reasons), the committee's restriction was void under the statute's general prohibition in subsection (b). Since the restriction prevented the reasonable use of solar panels, the exception in subsection (c) did not apply, and since there was no express restriction of solar panels, the exception in subsection (d) regarding installations visible from the ground did not apply. Defendants were therefore entitled to summary judgment on their claim for declaratory judgment. **Belmont Ass'n v. Farwig, 306.**

Good faith purchaser for value—fraudulent intention—imputation of knowledge—agency principles—In plaintiff's action pursuant to the Uniform Voidable Transactions Act—in which plaintiff, a nonprofit community organization, challenged a real estate transfer of land which it had previously owned and to which it had a potential claim under a separate lawsuit—defendants were not entitled to the protections afforded good faith purchasers for value where they purchased the land in a private sale from another developer with which defendants had formed a joint real estate development venture. Pursuant to principal-agent law and the doctrine of imputed knowledge, defendants were charged with the knowledge of their co-principal's fraudulent intent to shield the land from plaintiff as a creditor, which was accomplished by transferring title of the subject property—the co-principal's

REAL PROPERTY—Continued

last substantial asset—to defendants without public notice, appraisal, or negotiation during the pendency of plaintiff's appeal from the related lawsuit. **Cherry Cmty. Org. v. Sellars, 239.**

SEARCH AND SEIZURE

Vehicle checkpoint—reasonableness—Brown factors—A police checkpoint was lawful under the Fourth Amendment pursuant to *Brown v. Texas*, 443 U.S. 47 (1979), where the checkpoint's purpose—ensuring that each driver had a valid driver's license and was not intoxicated—operated to advance public safety and was reasonable; the checkpoint was conducted on a major thoroughfare during early morning hours conducive to catching intoxicated drivers; and the checkpoint caused only a small amount of traffic backup, it was visible to approaching drivers, and it was conducted in accordance with a plan under a supervising officer with specific restraints on time, location, and officer conduct. **State v. Cobb, 161.**

Warrantless search of person—lawfulness—search warrant executed at adjacent property—Defendant's motion to suppress drugs seized from his person was properly denied where competent evidence supported the trial court's findings of fact, which in turn supported the court's conclusion that law enforcement officers had reasonable suspicion to detain defendant pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968), even though defendant was adjacent to, and not on, the piece of property that was the subject of a search warrant (which was issued after defendant sold narcotics to a confidential informant at that address the previous day). Law enforcement was aware of defendant's criminal history as a drug dealer known to carry guns, defendant was in sight of the officers executing the search warrant, and there was a reasonable basis for the detaining officer to believe that defendant was armed. **State v. Tripp, 617.**

SENTENCING

Juvenile—murder—rape—consecutive sentences—de facto life without parole —In a case of first impression, where a fifteen-year-old defendant pleaded guilty to the rape and murder of his aunt, his consecutive sentences—240 to 348 months' imprisonment for first-degree rape and life with a possibility of parole for first-degree murder—violated both the federal and state constitutions because, taken together, they would keep defendant incarcerated for forty-five years (at which point, he would be sixty years old) before he could seek parole, and therefore they constituted a de facto sentence of life without parole. Juvenile offenders who are sentenced to life with the possibility of parole must have the opportunity to seek parole after serving no more than forty years of incarceration. **State v. Conner, 643.**

Juvenile—two first-degree murders—defendant "neither incorrigible nor irredeemable"—de facto life without parole sentence—Defendant's two consecutive sentences of life (twenty-five years each) with the possibility of parole for a double homicide he committed at the age of seventeen—issued upon resentencing in light of *Miller v. Alabama*, 567 U.S. 460 (2012)—violated both the Eighth Amendment of the federal constitution and article I, section 27 of the state constitution where the trial court found in the resentencing hearing that defendant was "neither incorrigible nor irredeemable" and where the consecutive sentences, which together required defendant to serve fifty years in prison before becoming eligible for parole, constituted a de facto sentence of life without parole. **State v. Kelliher, 558.**

TERMINATION OF PARENTAL RIGHTS

Appellate review—cumulative error review—declined to extend—The Supreme Court declined to expand the doctrine of cumulative error review to a termination of parental rights matter. **In re J.D.O., 799.**

Best interests of the child—adoptability—consent of children to being adopted—The trial court did not abuse its discretion by determining that the termination of a father's parental rights was in the best interests of his children. Although the father argued that the court did not sufficiently consider whether the children would consent to being adopted or whether they were ready to be adopted, the father's reliance on N.C.G.S. § 48-3-601, which provides that children over the age of twelve must consent to adoption, was misplaced because that statute governed adoptions and not termination of parental rights proceedings. Even if relevant, section 48-3-601 allows a trial court to dispense with the consent requirement upon a determination that it is not in the child's best interest to require consent. **In re M.R., 838.**

Best interests of the child—consideration of statutory factors—additional factors not listed in statute—The trial court did not abuse its discretion by concluding that terminating respondent-mother's parental rights in her daughter was in the child's best interests, where the court's factual findings were supported by the evidence and adequately addressed each dispositional factor in N.C.G.S. § 7B-1110(a), including that there was no bond between the child and respondent-mother (at best, the record showed that any bond between them had lessened significantly), and that the likelihood of adoption was high where the child was a "very loving little girl" who did not exhibit any behavioral issues and where social services had already identified two potential adoptive families. Further, respondent-mother's argument that trial courts should consider additional dispositional factors not listed in section 7B-1110(a) should have been directed to the legislature, and, at any rate, the catch-all provision in section 7B-1110(a)(6) allows courts to consider "any relevant consideration" not enumerated in the statute. **In re R.L.R., 863.**

Best interests of the child—dispositional factors—findings of fact—son's bond with mother and feasibility of adoption—The trial court did not abuse its discretion in determining that termination of respondent-mother's parental rights would be in her son's best interests where the findings—including those concerning the son's bond with his mother and the feasibility of adoption despite the son's behavioral issues—were supported by the record evidence. The trial court properly considered the dispositional factors in N.C.G.S. § 7B-1110(a) and performed a reasoned analysis weighing those factors. **In re J.A.J., 761.**

Best interests of the child—dispositional factors—incarcerated father—no contact with child—The trial court did not abuse its discretion in determining that termination of respondent-father's parental rights would be in his son's best interests where respondent would not be released from incarceration until three years after the trial court's termination order and he had made no effort to have any relationship with his son. The trial court properly considered dispositional factors in N.C.G.S. § 7B-1110(a) and performed a reasoned analysis weighing those factors. **In re J.A.J., 761.**

Best interests of the child—factual findings—evidentiary support—The trial court did not abuse its discretion in determining that it would serve the best interests of the children to terminate respondent-parents' parental rights where the court properly considered and made findings regarding the dispositional factors

TERMINATION OF PARENTAL RIGHTS—Continued

in N.C.G.S. § 7B-1110(a)—including that disrupting the routine and services established during the children's foster care would be needlessly detrimental and that the children lacked a strong bond with their parents—which had sufficient evidentiary support. There was no basis for the use of a "least restrictive disposition" test in this state, as suggested by respondent-parents. **In re J.C.J., 783.**

Best interests of the child—guardian ad litem recommendation—no termination of other parent's rights—The trial court did not abuse its discretion by concluding that termination of a mother's parental rights to her daughter was in her daughter's best interest where the court made specific findings as to each criteria found in N.C.G.S. § 7B-1110(a) and was not bound by the guardian ad litem's report, in which termination was not recommended. Further, although the court terminated the mother's rights but not the father's, its decision was not arbitrary since the best interests determination focuses on the child and not on the equities between the parents. **In re A.A., 325.**

Best interests of the child—statutory factors—adoptability—bond with mother versus prospective adoptive parents—The trial court did not abuse its discretion by concluding that terminating a mother's parental rights was in the best interests of her children, where the court's findings were supported by competent evidence, including a social worker's testimony regarding the children's adoptability and the likelihood of adoption by the children's foster parents, and demonstrated a proper consideration and reasoned weighing of the dispositional factors in N.C.G.S. § 7B-1110(a), including the relative bonds the children had with their mother and the foster parents. **In re M.R., 838.**

Best interests of the child—support for written findings—variation from oral findings—The trial court did not abuse its discretion by determining that it was in the child's best interests to terminate his mother's parental rights, where the court's findings of fact (with one exception) were supported by competent evidence and where those findings demonstrated a proper analysis of the dispositional factors set forth in N.C.G.S. § 7B-1110(a). The court was not bound by its oral statements at the dispositional hearing—regarding the parent-child bond and the mother's efforts toward reunification—when entering its final order, and therefore there was no error where the court's oral findings varied from its written findings. Further, the court was not required to enter any findings regarding dispositional alternatives to termination, such as guardianship. **In re S.D.C., 152.**

Collateral attack—initial custody determination—failure to appeal—not facially void for lack of jurisdiction—In his appeal from the trial court's order terminating his parental rights in his daughter, respondent-father could not collaterally attack the initial custody determination adjudicating his daughter as neglected and placing her in the department of social services' custody. Respondent's failure to appeal the initial custody determination precluded his collateral attack, and the exception regarding orders that are facially void for lack of jurisdiction did not apply. **In re D.R.J., 381.**

Findings of fact—sufficiency of evidence—compliance with case plan—In an appeal from an order terminating a father's parental rights in his daughter, many of the trial court's findings of fact were disregarded because they lacked the support of clear, cogent, and convincing evidence—including findings that the father failed to comply with portions of his case plan, that he lied about his drug use, that he failed to demonstrate the ability to provide appropriate care for his daughter, that he was

TERMINATION OF PARENTAL RIGHTS—Continued

in arrears in child support payments, and that he failed to seek assistance to find appropriate housing. **In re A.N.H., 30.**

Grounds for termination—abandonment—sufficiency of evidence and findings—The trial court properly terminated a mother's parental rights to her daughter based on abandonment (N.C.G.S. § 7B-1111(a)(7)) where clear, cogent, and convincing evidence showed that, during the relevant six-month period, the mother had no visitation or communication with the child; sent no gifts, cards, or clothing; did not inquire about the child's well-being; and was aware that her child support payments, which were garnished from her wages, went to the child's father, with whom the child did not reside, and were not used for the child's benefit. **In re A.A., 325.**

Grounds for termination—failure to pay a reasonable portion of the cost of care—dependency—sufficiency of evidence and findings—The trial court erred in determining that the grounds of failure to pay a reasonable portion of the cost of care (N.C.G.S. § 7B-1111(a)(3)) and dependency (N.C.G.S. § 7B-1111(a)(6)) existed to support termination of respondent-father's parental rights where insufficient evidence of each ground was presented before the trial court and therefore the factual findings were insufficient. Specifically, for the ground in N.C.G.S. § 7B-1111(a)(3), the single factual finding recited the statutory language, and there was no evidence or finding regarding the cost of the child's care or respondent's ability to pay; for the ground in N.C.G.S. § 7B-1111(a)(6), the trial court's single factual finding failed to address the availability of an alternate placement option, and no evidence was presented on the matter. **In re D.R.J., 381.**

Grounds for termination—failure to pay a reasonable portion of the cost of care—gifts—notice—The trial court did not err by concluding that respondent-parents' parental rights in their children were subject to termination on the grounds of failure to pay a reasonable portion of the cost of the care that the children received in foster care where the parents sporadically provided the children with gifts, clothing, and diapers during the determinative six-month period but failed to make any payment to the department of social services or to the foster parents. Further, the absence of a court order, notice, or knowledge could not serve as a defense to the parents' failure to support their children. Finally, because the trial court found that the father was consistently employed at the same job throughout the pendency of the case (the mother remained unemployed), it was not required to make specific findings concerning the six-month determinative period. **In re J.C.J., 783.**

Grounds for termination—failure to pay a reasonable portion of the cost of care—gifts, clothing, and birthday party—The trial court's order terminating respondent-father's parental rights in his children on the grounds of willful failure to pay a reasonable portion of the cost of care was affirmed where, during the relevant six-month period, he had the ability to pay more than zero dollars toward the cost of his children's foster care but failed to pay any amount to the department of social services or the foster parents. His sporadic provision of lunch, gifts, and clothing for the children and a birthday party for his daughter did not preclude the trial court's finding that he failed to pay a reasonable portion of the cost of the children's care. **In re M.C., 832.**

Grounds for termination—neglect—continued criminal activity—failure to engage with case plan—The trial court properly terminated respondent-mother's parental rights to her children on the ground of neglect based on findings, which were supported by clear, cogent, and convincing evidence, that, while the children

TERMINATION OF PARENTAL RIGHTS—Continued

were in DSS custody, respondent incurred new criminal charges; did not provide gifts, notes, letters, tangible items, or financial support to her children; and did not complete any aspect of her case plan. Respondent's periods of incarceration were not an adequate excuse for her lack of engagement with her children. **In re B.B., 343.**

Grounds for termination—neglect—failure to make reasonable progress—compliance with case plan—some drug use—An order terminating a father's parental rights on the grounds of neglect and failure to make reasonable progress was vacated and remanded where, after unsupported factual findings were disregarded, the remaining factual findings showed that the father complied with almost all of the requirements of his case plan, and no findings supported a conclusion that his continued drug use would result in the impairment or a substantial risk of impairment of his daughter. **In re A.N.H., 30.**

Grounds for termination—neglect—inability to parent—likelihood of future neglect—The trial court's order terminating a mother's parental rights on the grounds of neglect was affirmed where the court's finding that she was incapable of parenting her child (who had been adjudicated as neglected) was supported by clear, cogent, and convincing evidence—including testimony from her therapist and her own admission to her social worker—and where the court's determination that there was a likelihood of future neglect was supported by numerous findings—including those related to her inability to care for the child at the time of the hearing and her failure to make progress on her case plan. **In re B.R.L., 56.**

Grounds for termination—neglect—likelihood of future neglect—case plan, domestic violence, and parenting skills—The trial court's order terminating respondent-mother's parental rights in her child on the ground of neglect was affirmed where, even after the factual findings that lacked evidentiary support were disregarded, the trial court's conclusion that respondent was likely to neglect her child in the future was supported by the remaining findings—including that she had failed to adequately make progress on her case plan, she continued to have issues with domestic violence, and she had failed to show any ability to parent appropriately. **In re M.K., 418.**

Grounds for termination—neglect—likelihood of future neglect—extensive history of drug use and domestic violence—Disregarding one finding of fact that was not supported by record evidence (regarding a father's participation in substance abuse and parenting education classes while incarcerated), the trial court's termination of a father's parental rights to his four children on the ground of neglect was supported by the remaining findings and did not rest solely on the father's incarceration. The findings detailed the father's extensive history of domestic violence with the children's mother and drug dealing, multiple arrests, lack of direct contact with his children in three years, and minimal progress on his case plan. Therefore, the court's conclusion that there was a "very high" likelihood of a repetition of neglect was well supported. **In re B.E., 726**.

Grounds for termination—neglect—likelihood of future neglect—inability to provide care and safe environment—The trial court properly terminated a mother's parental rights to her three children on the ground of neglect where its unchallenged findings supported a determination that there was a likelihood of the repetition of neglect if the children were returned to the mother's care, based on her inability to provide stable housing or maintain utilities, her drug use, her criminal

TERMINATION OF PARENTAL RIGHTS—Continued

conduct leading to arrest and incarceration, and her delay of nearly twenty-one months after two of the children were taken into DSS custody before beginning to comply with her case plan. **In re M.R., 838.**

Grounds for termination—neglect—likelihood of future neglect—inadequate progress on case plan—The trial court's order terminating respondent-mother's parental rights in her daughter on the ground of neglect was affirmed where clear, cogent, and convincing evidence supported the court's factual findings, including that respondent-mother did not begin working on her social services case plan until shortly before the termination hearing; she failed to demonstrate the sustained behavioral changes necessary to ensure her child's safety and welfare, particularly where it came to her substance abuse and parenting-related issues; her visits with the child were discontinued because of her inconsistent attendance and the resulting negative effect on the child; and she failed to maintain suitable housing and stable employment. In turn, these findings supported the court's conclusion that there was a high likelihood of future neglect if the child were returned to respondent-mother's care. **In re R.L.R., 863.**

Grounds for termination—neglect—likelihood of future neglect—mental health issues—The trial court properly terminated a mother's parental rights to her three children based on neglect where its findings, supported by evidence, in turn supported the court's conclusion that there was a high likelihood of the repetition of neglect if the children were returned to the mother's care. Although the mother did make some progress on her mental health issues up to the time of the hearings, she remained unable to parent all of her children simultaneously, she was still prone to making angry outbursts, and she and the children's father were likely to resume their relationship after the completion of his incarceration, despite their extensive history of domestic violence. **In re B.E., 726.**

Grounds for termination—neglect—likelihood of future neglect—ongoing substance abuse—The trial court's order terminating respondent-mother's parental rights in her children on the grounds of neglect was affirmed where, despite some non-fatal deficiencies in the order, the children had been adjudicated as neglected and the mother continued to have substance abuse issues that demonstrated a likelihood of future neglect—as shown by her refusal to regularly comply with her case plan's required random drug screens and by the positive test for cocaine in her newborn daughter. **In re J.D.O., 799.**

Grounds for termination—neglect—likelihood of future neglect—pattern of domestic violence—In an order terminating respondent-father's parental rights to his four-year-old son on the ground of neglect (N.C.G.S. § 7B-1111(a)(1)), the trial court's determination that there was a likelihood of repetition of neglect if the child were returned to respondent's care was supported by unchallenged findings regarding the long history of domestic violence between respondent and the child's mother, respondent's violation of domestic violence protective orders, and respondent's aggression toward a social worker and display of a knife at a supervised visit. Although respondent made some progress on his case plan, his repeated denials that domestic violence occurred or that it was the reason for the child's removal gave rise to a justifiable concern about the possibility of future neglect. **In re K.Q., 137.**

Grounds for termination—notice—sufficiency of allegations—Where the department of social services' motion to terminate respondent-father's parental rights specifically cited only N.C.G.S. § 7B-1111(a)(3) and (a)(6) as grounds for terminating

TERMINATION OF PARENTAL RIGHTS—Continued

his parental rights, the trial court erred by adjudicating the existence of the grounds in N.C.G.S. § 7B-1111(a)(1), (a)(2), and (a)(7). A sentence in the motion under the paragraph citing N.C.G.S. § 7B-1111(a)(6)—even when coupled with prior orders incorporated by reference—alleging that the "parents have done nothing to address or alleviate the conditions which led to the adjudication of this child as a neglected juvenile" did not adequately allege statutory language to provide notice of the grounds in N.C.G.S. § 7B-1111(a)(1) or (a)(2), and the allegation in the motion referencing N.C.G.S. § 7B-1111(a)(7) with regard to the children's mother could not provide notice that respondent's parental rights were subject to termination on that ground. **In re D.R.J., 381.**

Grounds for termination—willful abandonment—attempts to regain contact with children—In a case involving ex-spouses who previously lived in Kentucky, the trial court properly dismissed the mother's petition to terminate the father's parental rights in their three children on the ground of willful abandonment. The court's factual findings showed that, during the determinative six-month period, the father paid child support and attempted to register in North Carolina the parties' Kentucky custody order (granting sole custody to the mother while entitling the father to seek review of the order and request visitation upon completing the Friend of the Court's recommendations). Further, the court found that the father—who had been prevented from contacting the children under protective orders entered in Kentucky—had made several efforts to regain contact with his children outside of the determinative six-month period, including complying with the Friend of the Court's recommendations, making multiple attempts to obtain relief from the protective orders, and relocating to North Carolina to be closer to where the mother had moved with the children. **In re N.W., 851.**

Grounds for termination—willful abandonment—incarceration—no contact with child—The trial court did not err by concluding that respondent-father's parental rights were subject to termination on the grounds of willful abandonment where he was incarcerated for nearly the entire time that his child was in the custody of social services and the evidence—including orders from prior proceedings and social workers' testimony that they were not aware of respondent-father ever calling the child or sending him any gifts—showed that he failed to make any efforts to communicate with his child during the relevant six-month time period. **In re J.A.J., 761.**

Grounds for termination—willful abandonment—neglect by abandonment—termination petitions denied—insufficiency of findings—The trial court's orders denying petitioner-mother's petitions to terminate respondent-father's parental rights in the children born of their marriage lacked sufficient findings of fact—both to support denial of the petitions and to permit meaningful appellate review—and therefore the orders were vacated and remanded for additional findings and conclusions. Specifically, for the ground of willful abandonment, the trial court failed to identify the determinative six-month period, failed to address whether respondent had the ability to seek modification of an order requiring him to have no contact with his children during the determinative period, and, with one exception, considered respondent's "actions to improve himself" occurring only outside the determinative period; for the ground of neglect based on abandonment, the trial court failed to make any findings. **In re B.F.N., 372.**

Grounds for termination—willful abandonment—sufficiency of findings—The trial court properly terminated a father's parental rights to his daughter on the ground of willful abandonment (N.C.G.S. § 7B-1111(a)(7)) where its findings, which were

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supported by clear, cogent, and convincing evidence, showed respondent's willful intention to forego all parental responsibilities by his complete lack of contact with his daughter for far longer than the determinative six-month period, his failure to inquire about the child by contacting her mother despite having multiple avenues to do so, and his written response to the mother that he was unwilling to provide any financial support. **In re B.E.V.B., 48.**

Jurisdiction—amendments to termination order—after notice of appeal given—substantive in nature—The trial court lacked jurisdiction pursuant to N.C.G.S. § 7B-1003(b) to amend its order terminating a mother's parental rights to her children after the mother had given notice of appeal of the original termination order because the amendments—multiple additional findings of fact which were neither mentioned in the court's oral ruling nor duplicative of other findings in the original order—were not merely clerical corrections but were substantive in nature. Therefore, the amended order was void, leaving only the original order subject to appellate review. **In re B.B., 343.**

Motion for continuance—more time for counsel to prepare—effective assistance of counsel—argument waived on appeal—The trial court did not err by denying respondent-mother's motion to continue a termination of parental rights hearing where her counsel told the court he needed more time to prepare a defense (respondent-mother had recently been incarcerated and would potentially be starting a 120-day substance abuse treatment program). Because counsel did not assert that the continuance was necessary to protect respondent-mother's constitutional right to effective assistance of counsel, the denial of the motion was reviewable for an abuse of discretion only; here, there was no abuse of discretion where respondent-mother failed to show any "extraordinary circumstances" to justify the continuance, which would have pushed the hearing beyond the ninety-day period prescribed by N.C.G.S. § 7B-1109(d). Moreover, there was no factual basis for respondent-mother's argument that her counsel's performance at the termination hearing was constitutionally deficient. **In re A.M.C., 719.**

Motion to continue hearing—denied—no prejudice—The trial court did not abuse its discretion by denying respondent-mother's motion to continue a termination of parental rights hearing (made on her behalf by her counsel when respondent did not appear at the hearing) where respondent failed to show the denial caused her prejudice, since she did not state that she would have testified or that a different outcome would have resulted if the motion had been allowed. **In re B.B., 343.**

Motion to continue—beyond ninety days after initial petition—extraordinary circumstances—notice of hearing—In a private termination of parental rights action, the trial court did not abuse its discretion in denying a mother's motion for a continuance beyond the statutory ninety-day period where there were no extraordinary circumstances to justify a continuance. While the mother claimed that it was difficult for her to travel from Ohio on such short notice (she claimed she received notice of the hearing date only five days in advance), she knew more than sixty days in advance which week the hearing would occur. **In re L.A.J., 147.**

Motion to continue—denial—incarcerated parent—due process argument waived—no extraordinary circumstances—A father's argument on appeal that the denial of his fourth motion to continue a termination of parental rights (TPR) hearing violated his due process rights was waived because his counsel did not raise the constitutional issue before the trial court. There was no abuse of discretion

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where the father had already been granted three continuances to allow more time to secure his participation by telephone from federal prison, there was no showing that another continuance would increase his chances at participation, and more than eight months had passed since the filing of the TPR petition. Therefore, there were no extraordinary circumstances pursuant to N.C.G.S. § 7B-1109(d) to justify another continuance. **In re B.E., 726.**

Motion to continue—extraordinary circumstances—incarcerated parent—COVID-19 lockdown—The trial court erred by denying a father's motion to briefly continue the adjudicatory hearing on a petition to terminate his parental rights where the prison in which the father was incarcerated was under lockdown due to COVID-19, preventing him from preparing for the hearing with his attorney and testifying on his own behalf. The lockdown at the prison was an "extraordinary circumstance" allowing the hearing to be continued beyond the statutory ninety-day period; the father's absence created a meaningful risk of error that undermined the fundamental fairness of the hearing because the father could not meet with counsel before the hearing, each of the four grounds for termination required a careful assessment of his conduct in prison, and no other witness was available to testify as to that information; and the error was prejudicial. **In re C.A.B., 105.**

Parent's competency—inquiry—trial court's discretion—In a termination of parental rights case, the trial court did not abuse its discretion by not conducting an inquiry into respondent-mother's competency where the trial court was aware that she suffered from mental illness and that she was not consistent in receiving mental health treatment. The record showed that the trial court had the opportunity to observe respondent-mother throughout the proceedings and that she understood the nature of the proceedings, her role in them, and how to assist her attorney in preparing for them. **In re J.A.J., 761.**

Permanency planning—cessation of reunification efforts—no change in plan—parent given additional opportunity for compliance—The trial court did not err by ordering the department of social services to cease reunification efforts between a father and his children—even though the court did not change the primary permanent plan from reunification—based upon findings that the father did not fully acknowledge his responsibility in the removal of his children from his care and the effect his mental health issues had on his parenting skills, that he had a pattern of noncompliance with his case plan, and that he continued to be aggressive and abusive with DSS workers. Given the father's behavior, the court did not violate N.C.G.S. § 7B-906.2(b) by deciding to give the father additional time to demonstrate compliance with his case plan rather than immediately eliminate reunification as a permanent plan. **In re C.H., 745.**

Permanency planning—eliminating reunification—statutory factors—availability of parent—In an appeal from a termination of parental rights (TPR) order and an earlier permanency planning order, although the findings in the TPR order challenged by the father regarding his lack of progress on his case plan were supported by competent evidence and the trial court made sufficient findings to address subsections (d)(1), (d)(2), and (d)(4) as required by N.C.G.S. § 7B-906.2 before eliminating reunification as a permanent plan in the earlier order, there were insufficient findings addressing subsection (d)(3)—whether the father remained available to the court, the department of social services, and the guardian ad litem. Since the trial court substantially complied with the statute, the appropriate remedy was not to

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vacate the permanency planning order, but to remand for entry of additional findings of fact. **In re C.H., 745.**

Subject matter jurisdiction—findings—record support—The trial court had subject matter over a termination of parental rights action where the trial court's order included a determination that it had subject matter jurisdiction and the record supported that determination. The trial court was not required to make an express finding of jurisdiction under N.C.G.S. §§ 50A-201, 50A-203, or 50A-204. **In re J.D.O., 799.**

Subject matter jurisdiction—standing—petition filed by stepmother—statutory requirements—A stepmother had standing to file a private termination of parental rights action against a child's mother pursuant to N.C.G.S. § 7B-1103(a)(5), thereby giving the trial court subject matter jurisdiction over the matter, where there was sufficient evidence that the child had resided with her stepmother continuously far in excess of the required statutory length of time immediately preceding the filing of the petition. The trial court was not required to make an explicit finding of fact establishing petitioner's standing, particularly where the mother did not raise the issue at the hearing. **In re A.A., 325.**

UTILITIES

General rate case—treatment of coal ash remediation costs—departure from prior precedent—not arbitrary and capricious—no equal protection violation—In a general rate case, the Utilities Commission neither acted arbitrarily and capriciously nor violated the equal protection provisions of the state and federal constitutions by authorizing a utilities company to amortize its coal ash waste remediation costs over a ten-year period instead of the five-year period it allowed in two earlier decisions—one from 2016 involving the same company and another involving Duke Energy Corporation—and by denying the company the ability to earn a return on the unamortized balance of those costs as it had permitted in the earlier decisions. The Commission's ratemaking decisions—which are legislative, rather than judicial, in nature—are not subject to res judicata or stare decisis principles. Further, the 2016 order expressly disclaimed having any precedential effect regarding the company's coal ash-related issues; the decision from the Duke rate cases was still on appeal when this case was heard, was reversed on appeal, and resulted in an unfavorable settlement for Duke; and the Commission's order in this case was supported by the record and adequately explained the Commission's basis for its decision. **State ex rel. Utils. Comm'n v. Virginia Elec., 499.**

WORKERS' COMPENSATION

Jurisdiction—timeliness of filing—N.C.G.S. § 97-24—standard of review—de novo—The Industrial Commission's determination of whether an injured employee's application for worker's compensation benefits was timely filed pursuant to N.C.G.S. § 97-24 constituted a jurisdictional fact and, therefore, was subject to de novo review on appeal. **Cunningham v. Goodyear Tire & Rubber Co., 10.**

Timeliness of filing—last payment of medical compensation—chronic back pain—related to prior injury—A claim for worker's compensation benefits filed by a press operator at a tire factory (plaintiff) was not time-barred pursuant to N.C.G.S. § 97-24 because she filed it within two years of the last payment of medical

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compensation by her employer—for a back injury she suffered in 2014—which occurred in 2017, not 2015 as found by the Industrial Commission. Records and testimony from plaintiff and multiple doctors demonstrated that plaintiff's medical treatment for chronic back pain in 2017 was related to her 2014 injury and was not due solely to injuries she sustained in 2011 (claims for which were settled in 2012). **Cunningham v. Goodyear Tire & Rubber Co., 10.**